83-857

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TOWN OF ORANGETOWN,

Petitioner,

v.

ANNE GORSUCH, Individually and as Administrator of the United States Environmental Protection Agency; RICHARD DEWLING, Individually and as Regional Administrator of the United States Environmental Protection Agency; ROCKLAND COUNTY SEWER DISTRICT NO. 1; COUNTY OF ROCKLAND; TOWN OF RAMAPO; TOWN OF CLARKSTOWN; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and ROBERT FLACKE, as Commissioner of the New York State Department of Environmental Conservation,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Administrator and Regional Administrator ("RA") of the United States Environmental Protection Agency ("EPA" or "Federal defendants") fail to make the determinations required under 33 U.S.C. §§ 1283 and 1284 of the Clean Water Act ("CWA") (33 U.S.C. §1251 et seq.), and 40 C.F.R. Part 35.925 (the "EPA Regulations"), in making the grants which are the subject of this action, and did any such failure render the grants unlawful?

2. May determinations of the nature of those required under 33 U.S.C. §§ 1283 and 1284 of the CWA, and 40 C.F.R. Part 35.925 be in some form other than in writing?

3. In weighing the controversial aspects of a major federal action to determine whether under 42 U.S.C. §4322(2)(c), Section 102(2)(c) of the National Environmental Policy Act ("NEPA")(42 U.S.C. §4321 et seq.), an Environmental Impact Statement ("EIS") should be prepared, does the significance of opposition to the action depend upon whether it is extraordinary in nature?

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TOWN OF ORANGETOWN,

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-against-

ANNE GORSUCH, Individually and as Administrator of the United States Environmental Protection Agency; RICHARD DEWLING, Individually and as Regional Administrator of the United States Environmental Protection Agency; ROCKLAND COUNTY SEWER DISTRICT NO. 1; COUNTY OF ROCKLAND; TOWN OF RAMAPO; TOWN OF CLARKSTOWN; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and ROBERT FLACKE, as Commissioner of the New York State Department of Environmental Conservation,

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REFERENCE TO OPINIONS

The opinion of the United States Court of Appeals for the Second Circuit, dated September 21, 1983, is reproduced in the Appendix ("A-") at pages A-1 - A-28. The opinion is not yet reported. The findings of fact and conclusions of law of the United States District Court for the Southern District of New York, rendered in two parts, are reproduced in the Appendix* at pages A-29 - A-56.

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* The reproduction in the Appendix is a retyping. The findings of fact and conclusions of law, as rendered by the District Court, were essentially those submitted by defendants, with certain

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The District Court also rendered an opinion on July 26, 1982, which is not reported and which is reproduced in the Appendix at pages A-57 - A-71.

JURISDICTION

The judgment of the Court of Appeals was entered on September 21, 1983. This Court has jurisdiction to review the Court of Appeals decision pursuant to 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are 33 U.S.C. §§ 1283 and 1284 and 40 C.F.R. Part 35.925 and 42 U.S.C. 4332(2)(c), Section 102(2)(c) of

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portions crossed out and certain changes and additions written in by the District Court. Copies of the findings and conclusions as originally rendered are transmitted separately to this Court.

NEPA. They are reproduced at pages A-100 - A-120.

STATEMENT OF THE CASE

Factual and Legal Background

Rockland County is part of the metropolitan New York area, in which sewage treatment facilities and related collector systems are indispensable to suburban growth.* In the course of such growth, communities often seek clean

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* Rockland County's suburban growth was one of the most rapid of all suburban areas in the country. It was particularly explosive in Ramapo. Its growth, and efforts to moderate and contain it, led to the enactment of the historic Ramapo Zoning Ordinance, under which the availability of sewage collection and treatment facilities was given critical importance. See Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 334 N.Y.S.2d 138 (1972); A. Rathkopf, Law of Zoning and Planning, §11.03 (4th Ed. 1982); 3 N. Williams, American Land Planning Law, §73.10 (1975); R.M. Anderson, New York Zoning Law and Practice §7.20 (2d Ed. 1973).

residential and commercial development and to be able to send to other communities that growth's less desirable aspects, such as their sewage.

Orangetown, one of the three mostly suburban towns of the County, has always collected its own domestic and industrial sewage, and treated it at its own plant in Orangetown, at Orangeburg. In the early 1960's, over the vigorous opposition of Orangetown, the Rockland County Sewer District No. 1 (the "District"), consisting of the other two mostly suburban towns of the County, Clarkstown and Ramapo, and Orangetown, was created. The District is governed by a board of seven Commissioners, only one of whom is selected by Orangetown.

The District thereafter built its own treatment plant (the "County plant") in

Orangetown, close to Orangetown's own plant. At all times since, Clarkstown and Ramapo have sent the bulk of their sewage to the County plant. This has helped them to retain their character as "bedroom" communities. The County plant has for many years suffered numerous breakdowns and failures, causing massive odor problems, which seriously and adversely affected the lives of the people residing and working in the nearby areas of Orangetown.

In the early 1970's, Ramapo and Clarkstown determined that, in order to grow as they desired, they needed additional interceptors and a doubling of their capacity to treat their sewage. Never seriously considering alternatives, and over Orangetown's objections, they decided to double the capacity of the County plant in Orangetown. That

decision, if implemented by the necessary financing, would mean that for at least another generation Clarkstown and Ramapo would be able to grow by sending their sewage to Orangetown.

The expanded facilities were to cost more than $100,000,000. Grants under Subchapter II of the CWA and its implementing regulations were to provide the great bulk of the funding.

The grant process, under that Subchapter and the EPA Regulations, 40 C.F.R. Part 35 Subchapter C., consists of three steps -- planning (Step 1), design (Step 2) and construction (Step 3). The process focuses in large part upon development and approval of a "facilities plan".*

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* The term "facilities planning" is

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The CWA itself outlines some aspects of the grant process. 33 U.S.C. §1283 (a) requires submission of a facilities plan to the Administrator of EPA who "shall act upon [it]", whose "approval [thereof] shall be deemed a contractual obligation of the United States for the payment of its proportional contribution to such project." 33 U.S.C. §1284(a) requires further that the Administrator make a number of specific determinations, "[b]efore approving grants for any project for any treatment works ...." §1284(b)(1) directs that, "the

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used in the EPA Regulations. It is defined in 40 C.F.R. §35.925-1. The CWA speaks of "plans, specifications, and estimates ...." 33 U.S.C. §1283(a). The term "facilities plan" or "planning" is used hereinafter in reference to both the CWA and the EPA Regulations.

Administrator shall not approve any grant for any treatment works ... unless he shall first have [made a number of other determinations]."

Much of the grant process consists of facilities planning. Implementing 33 U.S.C. §1283, approval of the facilities plan by both the State and the EPA Administrator, acting by the RA, is required, (40 C.F.R. §§ 35.920-3, and 35.917-8). Implementing 33 U.S.C. §1284, 40 C.F.R. §35.925 mandates that:

> Before awarding initial grant assistance for any project for a treatment works through a grant or grant amendment, the Regional Administrator shall determine that all of the applicable requirements of §35.920-3 have been met. He shall also determine the following." 40 C.F.R. §35.925 (emphasis supplied).

There follow twenty-one paragraphs of separate determinations which must be

made by the RA. 40 C.F.R. §§ 35.925-1 through 35.925-21.

Many of the determinations required by both the CWA and the EPA Regulations concern critical aspects of the project's funding. The RA must determine, among other things, that the applicant has "[t]he legal, institutional, managerial, and financial capability to insure adequate construction, operation and maintenance of the treatment works..." (40 C.F.R. §35.925-5(b)); that the design of the works complies with certain requirements (40 C.F.R. §35. 925-7); that the environmental review requirements for the project have been met (40 C.F.R. §35.925-8); and that the applicant "has made satisfactory provision to assure proper and efficient

operation and maintenance of the treatment works...." (40 C.F.R. §35-925-10).

Essential to the grant process is "public participation" at all principal stages of the facilities planning and environmental processing. There must be: consultation with the public "before selecting alternatives" (40 C.F.R. §35.917-5(b) (5)); a public meeting "when alternatives are largely developed but before an alternative or plan has been selected" (40 C.F.R. §35.917-5(b)(6)); and a public hearing "before final adoption of the facilities plan." (40 C.F.R. §35.917-5(b)(7)).

The public participation requirements concerning the alternatives to the project stem from the environmental processing requirements under NEPA and the regulations of the Council on Environmental Quality ("CEQ"), 40 C.F.R.

Part 1500, together with EPA's regulations implementing NEPA, 40 C.F.R. Part 6. The NEPA processing is integrated with the CWA processing.

The Proceedings Below

This action was commenced on February 21, 1981. Jurisdiction is based upon 28 U.S.C. §§ 1331, 1361, 2201 and 2202; 42 U.S.C. §4321 et seq. (and its implementing regulations), 33 U.S.C. §1251 et seq. (and regulations promulgated thereunder) and the principles of pendent jurisdiction.

Orangetown has sought judgment declaring unlawful Step 2 and Step 3 grants of approximately $10,000,000* by

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* Step 3 grants for $30,000,000 for major construction costs have been awarded since the District Court judgment in this action and are the subject of a subsequent federal court action and state court proceeding.

EPA and the New York State Department of Environmental Conservation (the "DEC" or the "State defendants") to the District, for the design and for a small portion of the construction costs of the project. Orangetown claims that EPA, in making the grants, acted arbitrarily, capriciously and otherwise contrary to law, by failing to make most of the determinations required before the grants might lawfully be made, and otherwise.

The action also challenges EPA's environmental processing of the project, charging that an EIS was required to be prepared, and that a short and shallow Environmental Assessment ("EA"), upon which a preliminary finding of no significant impact ("FNSI") was based, was inadequate.

Claims are also made under the New York State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law ("ECL"), §8-0101 et seq. Orangetown also alleges that the operation of the County plant and its emission of foul and noxious odors constitutes a nuisance which will be continued and aggravated if the project proceeds.

Each defendant has denied the material allegations of the complaint as to the illegality of the grants and as to the operation of the County plant constituting a nuisance.

In April, 1981, the State defendants moved, upon sovereign immunity and Statute of Limitations grounds, to dismiss the complaint as against them. The motion was heard on July 17, 1981. Decision was reserved.

The State defendants' motion was still sub judice in July 1982, when the District, County of Rockland and Ramapo (collectively the "County defendants") moved to dismiss for plaintiff's alleged failure to prosecute, or in the alternative, for an immediate trial. The District Court thereupon scheduled the trial for October 12, 1982. Shortly thereafter, the Court granted, in part, the State defendants' motion of April 1981, by dismissing, on Statute of Limitations grounds, plaintiff's claim under SEQRA.

Plaintiff sought discovery beginning in May 1981. It attempted to depose EPA by Delmar Karlen, Jr., Esq., the officer furnished by EPA. The deposition was not permitted by the Court except as to some aspects of the determination of

what was in the administrative record. The administrative record, of approximately 45 files, was first produced and certified by EPA in the fall of 1981. On September 9 and 22, 1982, with trial imminent, they found and produced some 20 additional files. On October 7, 1982, EPA found and produced an additional 20 files. Trial began on October 12, as scheduled, and continued until October 27. At its conclusion, the District Court dismissed plaintiff's nuisance claims and reserved judgment on its other claims. It directed the parties to prepare findings of fact and conclusions of law.

On January 24 and 25, 1983, the Court essentially adopted the defendants' findings and conclusions. It dismissed

the complaint. Judgment was entered on February 4, 1983.

Plaintiff appealed on February 10, 1983. On motion by the County defendants, the Court of Appeals expedited the briefing and argument of the appeal. Argument was set down for, and held on, April 22, 1983.*

Approximately four months after the oral argument, a highly unusual and unorthodox sequence of events took place, relating to the first question presented by this petition. On or about August 8, 1983, the Clerk of the Court of Appeals, without informing petitioner's counsel, requested of EPA

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* Seventeen days after argument EPA counsel, without any request therefore by the Court of Appeals, supplemented its brief and oral argument, regarding aspects of the impact of the project upon wetlands, in and by a three page letter to the panel of judges.

counsel that it forward to the Court of Appeals for its review so much of the administrative record as related to EPA's administrative actions pursuant to 40 C.F.R. §35.925. On August 9, 1983 EPA's counsel responded, forwarding portions of the record, and stating, by letter dated August 9, 1983, the following:

> We are herewith transmitting the portions of the record cited in pages 36-41 of our brief, together with a copy of the index to the administrative record. The administrative record was introduced at trial as EPA Exhibit D, and each sequentially numbered folder in the administrative record ("A.R.") was given a corresponding number in EPA Exhibit D (i.e., Folder "A.R. 2" was introduced as EPA Exhibit D 2, Folder "A.R. 3" was introduced as EPA Exhibit D 3, etc.).

Plaintiff's counsel learned of the request and response upon receipt of a copy of the letter of August 9, 1983.

On or about August 15, 1983, the Court of Appeals was evidently still unable to locate the determinations in the amorphous 86 volume record. The Deputy Clerk of the Court of Appeals called EPA counsel a second time and requested that EPA identify those portions of the administrative record constituting its determinations pursuant to 40 C.F.R. §§ 35.925-1 through 35.925-21. Plaintiff's counsel were not informed of this second request.

EPA counsel responded approximately one week later. The response was a 27 page letter-brief to the Court of Appeals, in which it presented arguments, supplementing, and in some respects differing from, the arguments in its brief and oral argument, as to what the administrative record set forth

in lieu of most of the findings required. It also argued that it "never expressly or implicitly consented to trial of such claims and could have offered other evidence if there had been adequate notice that all 21 subdivisions [of 40 C.F.R. §35.925] were in issue." (August 23, 1983 letter at page 3).

Plaintiff's counsel learned of the Court of Appeals' second request and the 27 page response thereto upon receipt of a copy of it. Plaintiff thereupon moved the Court of Appeals for an order striking the response, as an authorized post-argument brief, or, in the alternative, for five (5) working days to respond thereto if the motion to strike were not granted. Plaintiff's motion was denied by the Court of Appeals, without any reason given or any state-

ment as to time for response. Plaintiff's counsel thereupon interposed a letter answering some of the points made by EPA counsel in their post-argument letter-brief.

On September 21, 1983, the Court of Appeals affirmed the District Court's judgment in all respects, with each party to bear its own costs. It upheld the District Court with respect to EPA's "Finding of No Significant Impact" and its "Procedural Compliance with Construction Grants Program". With respect to Orangetown's contention that EPA failed to assess and make the specific findings required by 40 C.F.R. §§ 35.925-1 through 35.925-21, the Court of Appeals stated:

> We note, however, that while a clear and concise document outlining seriatim the agency's response to the demands

> of Section 35.925 would be of considerable assistance to a court's review of EPA's actions, the regulations do not require that the agency's actions be set down in any particular order or form, or even that its determinations be made in writing. All that is necessary is that a reviewing court be able to trace from the written record the path followed by the agency in deciding to take a particular action. See generally Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc. ["Bowman"], 419 U.S. 281, 285-86 (1974). (A-25 - A-26).

Annotating (A-24 n. 10) its ruling concerning the determinations question, the Court of Appeals stated that "only three of the 21 determinations were contested in the district court." This statement was based upon its implied affirmance of the District Court's denial of plaintiff's motion under "Fed. R. Civ. P. 15(b) to conform its

pleadings to the proof adduced at trial...." Id.

Petitioner submits that the issue of the "17 remaining determinations" was, however, before the District Court. Id. Whether or not all or any of the required determinations were made is determined by the administrative record. EPA put the entire administrative record in evidence and submitted no other evidence. EPA was not denied any opportunity to "offer any additional evidence", because no other evidence could have been adduced to prove what was in the record. EPA fought throughout the trial and pretrial proceedings to bar any evidence outside of the administrative record. (A-24 n.10). The unusual sequence of events dealing with the 40 C.F.R. §35.925 determina-

tions that took place four months after argument of the appeal also enabled EPA counsel to do more than would a party litigating, in the ordinary fashion in the District Court, the issue of the requirements of the said determinations. The District Court's denial of Orangetown's motion to conform the pleadings to the proof is plainly erroneous.

REASONS FOR GRANTING THE WRIT

1. This case involves important issues, going to the heart of the administrative process, concerning the enforceability of statutory and regulatory requirements that an agency make specific determinations and findings* as the basis of non-adjudicative agency action.

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* The terms "determinations" and "determine" are used in this petition, as did all parties in the proceedings below, interchangeably or together with the terms "findings" and "find".

Both 33 U.S.C. §§ 1283 and 1284 of the CWA, and EPA's own regulations direct that before the making of the grants a number of important explicit factual and legal determinations be made. Many of the determinations were directly related to important* statutory conditions precedent for the grants. Only two of the determinations can even arguably be said to appear in the administrative record, placed in evidence, in its entirety, by the Federal defendants. (EPA Ex. D1-86).**

Positions taken by the Federal defendants to explain the absence of the

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* See generally a Legislative History of the Federal Water Pollution Control Act Amendments of 1972, Environmental Policy Division of the Library of Congress (January 1973).

** This reference is to the exhibits entered at the trial in the District Court.

findings took an erratic course before the District Court and Court of Appeals.

At the deposition of EPA, by Delmar Karlen, Jr.,* plaintiff's counsel asked him what documents constituted the determinations required by 40 C.F.R. §35.925. Counsel for EPA agreed to deem that question an interrogatory and to respond thereto. EPA's answer, by letter dated October 14, 1982, stated:

> You have asked for a statement of the documents in the record that relate to 40 C.F.R. § 925. As the federal defendants explained previously (Karlen Affidavit, para. 11), award of the Rockland County Sewer District No. 1 ("R.C. S.D. No. 1") and Town of Ramapo grants by EPA, after review of the facilities plan, constituted EPA's determinations regarding the require-

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* The District Court limited questions asked at that deposition to the steps taken by EPA to assemble its administrative record.

> ments of 40 C.F.R. §35.925. As the federal defendants also noted, the administrative record may contain additional evidence of these determinations. . . .
>
> Additionally, the administrative record contains numerous letters approving various sets of plans and specifications and subagreements. (emphasis supplied).

The interrogatory and answer were read into the record of the trial without objection. At trial, EPA's counsel placed the entire administrative record in evidence but did not identify where in that record any of the determinations appeared.

In their post-trial brief, defendants argued that the subject matter of the items was analyzed thoroughly by DEC and EPA and that the EA, not the "award of the ... grants", constituted most of EPA's determinations. The District

Court's finding with respect to the subject matter was:

> The Administrative record reflects that the EPA considered those elements of the project required to be analyzed by 40 C.F.R. §35.925. Although there is no separate document listing specific determinations with respect to every element specified in 40 C.F.R. 35.925, taken as a totaling the administrative record reflects that the objectives of 40 C.F.R. §35.925 were accomplished and therefore EPA complied with its terms. (A-44).

In the Second Circuit, defendants relied upon the EA as the place to find the determinations. They argued at page 36 of their brief, citing Bowman, that "the administrative record is more than sufficient for a reviewing court to follow the path the agency took in discharging its statutory duties."

Four months after oral argument of the appeal, EPA furnished in its post-

hearing brief the details of the evidence that allegedly would support the findings, had they been made.

The Court of Appeals adopted defendants' argument about "the path the agency took", citing Bowman. That case, plaintiff submits, does not stand for the proposition that statutory and regulatory requirements for specific findings need not be followed, and that "a decision of less than ideal clarity" may be upheld, "if the agency's path may reasonably be discerned." Bowman, 419 U.S. at 286.

The "agency path" language of the Supreme Court in Bowman appears at the conclusion of a paragraph of the opinion of this Court in Bowman, per Mr. Justice Douglas, discussing in general terms the "'arbitrary and capricious' standard" of

judicial review of agency action. Id. at 285. The paragraph immediately preceding the paragraph in which that quotation appears is the specific recital by this Court of the fact that the agency involved, the Interstate Commerce Commission, had "made both findings" required by its organic act.*

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* The "path followed" phrase appears in an earlier opinion by Mr. Justice Douglas, in Colorado Interstate Gas Co. v. Federal Power Commission, 324 U.S. 581, 584 (1945) in which Orders under "§5 of the Natural Gas Act of 1938, 52 Stat. 823, 15 U.S.C. §717d, 15 U.S.C.A. §717d", were reviewed and affirmed by the Tenth Circuit. In affirming the ruling of the Tenth Circuit, this Court discussed the sufficiency of detail of the Federal Power Commission's findings. The findings were said to be "quite summary" incorporating by reference Commission exhibits, but, the Court stated, "the path which it followed can be discerned." Id. at 595. Accord, Wasson v. Securities Exchange Commission, 558 F.2d 879 (8th Cir. 1977).

Bowman accordingly, cannot be deemed to be this Court's answer to the question of the effect of the failure of an agency to render findings required by statute or by its own regulation as the basis of non-adjudicative agency action.

In a number of earlier cases, concerned with more formal agency action, the Supreme Court has held that such an agency failure invalidates its determination. See Wichita R. & Light Co. v. Public Utilities Commission, 260 U.S. 48 (1922) (rate order); Mahler v. Eby, 264 U.S. 32 (1924) (deportation of an alien); United States v. Fish, 268 U.S. 607 (1925) (order of board of general appraisers). In a number of cases involving the ICC, this Court has also held that, apart from specific statutory requirements, determinations by that agency could not be sustained unless

supported by express findings of the basic or jurisdictional facts. United States v. Baltimore & O.R. Co., 293 U.S. 454 (1935); United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499 (1935); Atchison, T. & S.F.Ry. Co. v. United States, 295 U.S. 193 (1935); Florida v. United States, 282 U.S. 194 (1931).*

Perhaps the most pervasive findings requirement is that of the Administrative Procedure Act ("APA"), 5 U.S.C. §557(c)(3)(A), which requires that in every on-the record proceeding the agency rendering a decision include a statement of "findings and conclusions, and the reasons or basis therefore, on

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* See Necessity, form and contents of express findings of fact to support administrative determinations, Annot., 146 A.L.R. 209 (1943).

all the material issues of fact, law, or discretion presented in the record." This requirement is rigorously enforced, although there are varying rulings, from case to case, as to the exact degree of particularity of the findings required. See, e.g., California v. Federal Power Commission, 345 F.2d 917 (9th Cir.), cert. den., 382 U.S. 941 (1965); Anglo-Canadian Shipping Co. Ltd. v. Federal Maritime Comm'n, 310 F.2d 606 (9th Cir. 1962); Bell Lines, Inc. v. United States, 263 F. Supp. 40 (S.D.W. Va. 1967); Missouri Pacific Railroad Co. v. United States, 203 F. Supp. 629 (E.D. Mo. 1962).

Should the determinations requirements, statutory and regulatory,* for

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* Enforcement of an agency's regulatory

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grants under the treatment works program of the CWA be enforced at least as rigorously as those of the APA? This Court has not ruled on the question. Nor, so far as petitioner's counsel have been able to discover, does any decision of this Court answer the same question in the context of agency grant making action or other informal agency action.

The function and importance of findings requirements is a principal subject of Overton Park. This Court, after holding that action of the Secre-

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requirement of specific determinations is consistent with the more general rule that an agency must adhere to "a strict standard of compliance" with its own regulations and procedures. Citizens to Preserve Overton Park ("Overton Park"), 401 U.S. 402 (1971). See also United States v. Nixon, 418 U.S. 683, 694-96 (1974). See Note, Violation by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629, 630 (1974).

tary of Transportation under Section 4(f) of the Department of Transportation Act of 1966 (49 U.S.C. §1653(f)) was reviewable, began discussion of the review process by observing that:

> Undoubtedly, review of the Secretary's action is hampered by his failure to make such findings, but the absence of formal findings does not necessarily require that the case be remanded to the Secretary. Neither the Department of Transportation Act nor the Federal-Aid Highway Act require[d] such formal findings. Moreover, the Administrative Procedure Act requirements that there be formal findings in certain rulemaking and adjudicatory proceedings do not apply to the Secretary's action here. See 5 U.S.C. §§ 553(a)(2), 554(a) (1964 ed., Supp. V).* Overton Park, 401 U.S. at 417.

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* The Court further noted that:

> And, although formal findings may be required in some cases

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The Court went on to hold that the lower court review of the Secretary's action, "based ... on the litigation affidavits that were presented" was inadequate because "[those] affidavits were merely 'post hoc' rationalizations ...." Overton Park at 419. This Court remanded the action to the district court for review "based on the full administrative record".* In that review

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> in the absence of statutory directives when the nature of the agency action is ambiguous, those situations are rare. See City of Yonkers v. United States, 344 U.S. 298, 320 (1953). Overton Park, 401 U.S. at 417.

* Subsequent proceedings in the district court are described in W. Gelhorn, C. Bayse and P. Strauss,

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the district court might "require the administrative officials who partici-

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Administrative Law Cases and Comments (7th Ed. 1979):

> The remand in Overton Park was indeed arduous; it produced a 25-day hearing in district court following extensive (and disruptive) pre-trial discovery, all seeking to 'prove' the Secretary's reasoning process for the purpose of permitting Section 706(2)(A) review to occur. The process threatened to bring into public view pre-decisional advice to the Secretary ordinarily regarded as privileged, as part of the 'full administrative record that was before the Secretary at the time he made his decision.' Whether or not 'formal findings' were 'required', surely there was profound impetus to making them in the Court's observation that, 'where there are administrative findings that were made at the same time as the decision, as was

pated in the decision to give testimony [by deposition or on trial] explaining their action." Overton Park, 401 U.S. at 420.

The availability of discovery to supplement the administrative record, as well as the propriety of the Court's receiving evidence -- on summary judgment motion or at trial -- beyond the administrative record, has become a problem of increasing import since Overton Park. The problem was before this Court in Camp v. Pitts, 411 U.S. 138, 142 (1973), in which it held that

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> the case in [United States v. Morgan, 313 U.S. 409 (1941)], there must be a strong showing of bad faith or improper behavior before such inquiry may be made.' See also Camp v. Pitts, p. 338 above. Id. at 368-69 (footnotes omitted).

"the focal point for judicial review [of administrative action] should be the administrative record already in existence, not some new record made initially in the reviewing court."

Since Camp v. Pitts, supra, a large number of cases have dealt with the problem of whether in review of informal agency action the administrative record may be supplemented.

The problem is acute in review of environmental agency action and in a number of cases,* particularly those involving review of the sufficiency of EAs or EISs, it has been held that

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* See, e.g., Webb v. Gorsuch, 699 F.2d 157 (4th Cir. 1983); Asarco, Inc. v. U.S.E.P.A. ("Asarco"), 616 F.2d 1153 (9th Cir. 1980); County of Suffolk v. Secretary of Interior ("County of Suffolk"), 562 F.2d 1368 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978).

supplementation of the administrative record should be permitted and discovery should be available.* The District Court held to the contrary herein. It forbade inquiry, on discovery and at trial, into what constituted the findings and where they were, and precluded virtually all other discovery.

The importance of findings can hardly be overstated. Findings are not some formal tidying up of administrative agency decisionmaking, on the record or informal. Whether they exist or not is the first and fundamental inquiry in the judicial review process. They are the clearest indication of the bases of the administrative action. If findings do

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* See, Webb v. Gorsuch, supra; Asarco, supra, County of Suffolk, supra. K. Davis, Administrative Law Treatise at 570-74 (1982 Supplement).

not appear in the record and the bases of the decisionmaking are not otherwise clear, the court reviewing the action may require discovery.

Twenty-one years after Overton Park, in its most recent statement of general principles of the scope and manner of judicial review of the administrative action, this Court again referred to findings as an essential aspect of such review. The duty of the agency, as stated in Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co. ("Motor Vehicle"), ___ U.S. ___, 103 S.Ct. 2856, 2866-67 (1973), quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962), is to "examine the relevant data and articulate a satisfactory explanation for its action

including a 'rational connection between the facts found and the choice made.'"

In Motor Vehicle the facts to be found were not specifically mandated by statute or regulation. In this case they are. It is not the function of the reviewing court to find the facts. Nor when specific determinations are mandated by the very statute that defines the power and duty of the agency to act, and by the agency itself, should it be permitted to tell the reviewing court: "You trace our path to find the 'facts [we] found'. We assure you they are there somewhere."

Findings are closely related to a statement of reasons. Both enable a reviewing court to examine into the bases of the agency decisionmaking to determine whether it is rationally

connected to the facts. In Dunlop v. Bachowski, 421 U.S. 560 (1975), this Court construed §401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §482(a), to require a detailed statement of reasons by the Secretary of Labor for his non-adjudicative action of denying a complaint by an unsuccessful candidate for union office. The Court stated:

> [W]hen action is taken by [the Secretary] it must be such as to enable a reviewing Court to determine with some measure of confidence whether or not the discretion, which still reamins in the Secretary, has been exercised in a manner that is neither arbitrary nor capricious .... [I]t is necessary for [him] to delineate and make explicit the basis upon which discretionary action is taken... [W]w may reasonably infer that Congress intended that the Secretary supply the member with a reasoned statement why he determined not to proceed ... Finally, a 'reasons' require-

> ment promotes thought by the Secretary and compels him to cover the relevant points and eschew irrelevancies... Id. at 571-72 (citations omitted).*

The Court ruled insufficient the statement by Secretary Dunlop that:

> [b]ased on the investigative findings, it has been determined ... that civil action to set aside the challenged election is not warranted. Id at 563.

EPA's failure to make virtually all of the determinations required by the

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* Whether and when formal findings or statements of reasons may be required as a matter of procedural due process has been a subject of increasing attention since Goldberg v. Kelly, 397 U.S. 254 (1970). In Some Kind of Hearing, 123 U.Pa. L. Rev. 1267 (1975), Judge Friendly has stated:

> A written statement of reasons, almost essential if there is to be judicial review, is desirable on many other grounds. The necessity

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CWA and its own Regulations left its grantmaking decisions virtually without

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> for justification is a powerful preventive of wrong decisions. Id. at 1292.

In A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739 (1976), Professor Verkuil states:

> A statement of reasons for a decision has long been an essential predicate to judicial review and a concern of due process. Failure by an agency to provide some contemporary statement of reasons for informal decision making places the reviewing court in an unseemly dilemma. The court must either exercise weak review over the informal process and affirm even when in doubt about the basis for the decision or engage in strict review that can involve an unwarranted intrusion into the decision maker's mental processes. Id. at 739 (footnotes omitted).

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findings or a statement of reasons. The burden of searching for findings and reasons was cast upon the reviewing court, and thereby on the plaintiff charged with the burden of proof.

The thwarting of plaintiff on both discovery and trial rendered the imposition upon the plaintiff of finding-the findings task especially egregious in this case. In weighing the significance of the absence of the required findings this Court must, of course, consider the nature of the administrative action brought before the District Court for review. It was

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See also K. Davis, Discretionary Justice: A Preliminary Inquiry, 104:05 (1969); Soafer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 Colum. L. Rev. 1293 (1972).

non-adjudicative, non-adversarial. The District was the applicant for the grants and EPA the grantor. Orangetown was in essence an intervenor.

Intervenors have important rights, however. Orangetown's interest in opposing use of over $100,000,000 of federal grants, to compel it to suffer Clarkstown's and Ramapo's sending their sewage to Orangetown for at least another generation (the "transaction which [was] the subject of the [administrative] action..."), was at least equal to the interests of a party entitled to intervention as of right or permissive intervention in a civil action, under Rule 24 of the Federal Rules of Civil Procedure.

The burden of searching for the findings was, of course, added to the

David versus Goliath type burdens ordinarily cast upon small communities attempting to assert their interests and rights before comparatively massive federal agencies and their grantees. The imposition of the additional burdens was unlawful and unjust.

2. The Court of Appeals ruling that the determinations required by 40 C.F.R. §§ 35.925-1 through 35.925-21 may be in a form other than in writing, is in conflict with applicable decisions of this Court.

The Court of Appeals held that the EPA Regulations "do not require that the agency's actions be set down in any particular order or form, or even that its determinations be made in writing..." (A-24).

It is correct that no particular form is required. The holding that the

determinations need not be in writing must mean, however, that (1) they may be oral or (2) they may be implied by the agency and inferred by a reviewing court.

If they are oral they would appear in the administrative record. They would have to be proven by oral testimony from an official, presumably, testifying "Yes, we made those §§ 35.925-1 through 35.925-21 determinations". Thereupon the official would be subject to cross-examination as to when and by whom they were rendered and other details. The same matters would be within the scope of discovery, by deposition and otherwise, which would be permitted because the bases of the agency's decisionmaking would not be clear from the record. See Overton Park, supra.

The foregoing scenario might be a feasible one in some cases. Plaintiff was not permitted any such inquiry in this case. The District Court forbade such inquiry both on discovery and trial.*

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* The barring of such discovery is discussed above. At the trial, the following colloquy between plaintiff's counsel and the court occurred:

> The regulations call for specifically certain determinations and rulings by EPA. We have been told that all of those determinations and rulings luck somewhere in all of these boxes.
>
> We have been trying, since the beginning of this action to determine where is which. If no evidence comes out with respect to that, then for your Honor to determine whether those rulings and determinations have been made, your Honor must at the close of

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If determinations or findings may be implied by the agency, the requirement of determinations or findings may, for all practical purposes, be deemed stricken from statute and the regulation. The reviewing court would have to

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> this case or at some time go through all of those documents.
>
> . . .
>
> THE COURT: No. I am not going through all of the documents. I am relying on counsel for the government to point out to me where in the documents these rulings, the requirement that there be determinations have been complied with.
>
> MR. SIVE: And that is, your Honor, if they are to point that out to you, then I submit that that should be pointed out to us as part of the case

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search through each document in the administrative record for its implications. In this case, four months after argument of the appeal, the Court of Appeals had to ask EPA counsel to assist it in finding the determinations. EPA's 27 page post-argument letter-brief purported to explain their absence.

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> so that we may look at those which they point out and then argue to your Honor they are or are not.
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> THE COURT: Look, that's not before me at this moment.
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> What's before me at this moment is whether this witness is to be asked what documents, I take it, he considers to be those. That's what you want to ask him?
>
> MR. SIVE: That's correct.
>
> THE COURT: I already ruled I won't permit that question.

If determinations may be implied by the agency, any requirement by statute or by the agency itself that it make them would have less force than a requirement of a statement of reasons. The requirement of §555(e) of the APA, applicable to on the record and informal agency action, woud have greater force than that of §557(c) requiring findings and conclusions in on the record proceedings. The premise leading to such a result must be rejected.

Whether the Court of Appeals holding is deemed to mean that the required determinations may be implied by EPA or may be oral, petitioner submits that it is inconsistent with the rulings of this

Court in Overton Park and Motor Vehicle and other cases.*

3. The Court of Appeals' ruling concerning public controversy decides an important question of federal law which has not been, but should be, settled by this Court.

The District was born in the controversy inherent in one community's sending its sewage to another. The controversy deepened through the years as the County plant emitted massive odors, reshaping life in the areas of

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* See also Nader v. NRC, 513 F.2d 1045 (D.C. Cir. 1975); USU Pharmaceutical Corp. v. Secretary of HEW, 466 F.2d 455, 462 (D.C. Cir. 1972); Joseph v. F.C.C., 404 F.2d 207 (D.C. Cir. 1968). Compare with Clermont National Bank v. Citizens Bank National Ass'n, 329 F. Supp. 1331, 1336 (S.D. Ohio 1971) and Sterling National Bank of Davie v. Corp., 431 F.2d 514, 517 (5th Cir. 1970), cert. denied, 401 U.S. 925 (1971).

Orangetown around it. As the District, controlled by Clarkstown and Ramapo, developed its plans, never seriously considering alternatives of treating their own sewage in their own communities, the controversy deepened and broadened. When the District, in or about 1974, determined to double its plant's capacity by using over $100,000,000 of federal monies, long before the first public meeting held by it concerning the project, the controversy was further aggravated.

The Court of Appeals considerd and ruled upon the "Pubic controversy" aspect of the project. It referred to the rule that the term refers to instances where "a substantial dispute exists as to the size, nature or effect of the major federal action rather than

to the existence of opposition to a use." Hanly v. Kleindienst ("Hanly II"), 471 F.2d 823, 830 (2d Cir. 1972), cert. denied, 412 U.S. 908, subsequent appeal, 484 F.2d 448 (2d Cir. 1973), cert. denied sub nom. Hanly v. Saxbe, 416 U.S. 936 (1974).

The Court of Appeals then, however, applied a different standard for evaluating controversy, ruling that: "The record lacks a sufficient basis to indicate that the opposition to this project was of such an extraordinary nature as to require an EIS." (A-22).

Neither Hanley II nor Rucker v. Willis, 484 F.2d 158, 162 (4th Cir. 1973) holds that opposition to a project need be "extraordinary in nature" in order to be a factor in determining whether a major project significantly

affects the human environment, thereby requiring an EIS. What is meant by that phrase is also unclear. If it means that the opposition to a project, in order to be a factor in determining whether an EIS should be prepared, must use some unusual means or methods, or arise in some groups of people who would not ordinarily oppose a project, or who are members of some small elite constitutency, the "extraordinary" requirement would indeed be counter to decided cases and to sound public policy.

The fact is that the opposition of Orangetown to the project is ordinary in the sense that it is the logical reaction by one community to that of others who want their development but not their sewage, and seek massive federal monies to indulge such wants.

Sewage treatment plants are, of course, inherently undesirable. (A-51). Under the best of circumstances they create problems, including, at times, odors.

The opposition of Orangetown has not used any unusual means or methods to render it extraordinary. It has petitioned the agency, appeared before it, albeit not before the alternative to which it objected was selected by the District, because no opportunity to do so was provided. It has made its case in court. The opposition may be deemed extraordinary in the sense of the numbers and varied groups united in opposition, represented by the Town government exercising its lawful governmental powers.

The Court of Appeals, petitioner submits, applied a criterion not recognized by the prior cases or by the

CEQ Regulations and incompatible with sound public policy.

No Supreme Court case has ruled on the nature or degree of the controversy that may be relevant to the determination of whether an EIS is required. Every litigated proceeding administrative or judicial, raising the issue of the requirement of an EIS reflects controversy. This Court should rule on the matter of public controversy under NEPA.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1260—August Term, 1982

(Argued April 22, 1983 Decided September 21, 1983)

Docket No. 83-6035

TOWN OF ORANGETOWN,

Plaintiff-Appellant,

—v—

ANNE GORSUCH, Individually and as Administrator of the United States Environmental Protection Agency; RICHARD DEWLING, Individually and as Regional Administrator of the United States Environmental Protection Agency; ROCKLAND COUNTY SEWER DISTRICT NO. 1; COUNTY OF ROCKLAND; TOWN OF RAMAPO; TOWN OF CLARKSTOWN; and ROBERT FLACKE, as Commissioner of the New York State Department of Environmental Conservation,

Defendants-Appellees.

Before:

OAKES, PIERCE and PECK,*
Circuit Judges.

Appeal from a final judgment of the United States District Court for the Southern District of New York (Owen, J.) which dismissed plaintiff's action seeking declaratory, injunctive and other relief under the National Environmental Policy Act, the Federal Water Pollution Control Act Amendments of 1972 and the State Environmental Quality Review Act.

Affirmed.

DAVID SIVE, New York City (Laurence B. Jones, Winer Neuburger & Sive, P.C., New York City, of counsel) *for Plaintiff-Appellant Town of Orangetown.*

PETER A.A. BERLE, New York City (Carol A. Buckler, Berle, Butzel, Kass & Case, New York City, of counsel) *for Defendant-Appellees Rockland County Sewer District No. 1, et al.*

GAINES GWATHMEY, Assistant United States Attorney, Southern District of New York (John S. Martin, United States Attorney for the Southern District of New York;

* Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

Thomas D. Warren, Assistant United States Attorney, Southern District of New York; Gary M. Rowan, Assistant Regional Counsel of U.S.E.P.A., of counsel) *for Defendant-Appellee U.S. Environmental Protection Agency.*

MARY LYNDON, Assistant Attorney General for the State of New York (Robert Abrams, Attorney General for the State of New York, of counsel) *for Defendant-Appellee Flacke.*

VINCENT J. ACESTE, Harrison, New York (Alfred E. Page, Clune, White & Nelson, Harrison, New York, of counsel) *for Defendant-Appellee Town of Clarkstown.*

PIERCE, *Circuit Judge*:

The Town of Orangetown appeals from a final judgment of the United States District Court for the Southern District of New York, Richard Owen, *Judge*, dismissing plaintiff's challenge to the approval by the Environmental Protection Agency (EPA) of construction grants for the design and expansion of the Rockland County Sewer District No. 1 (RCSD) sewage treatment system, and for a portion of the construction costs of said expansion. At the heart of this appeal is the issue of the appropriate scope of judicial review of an administrative agency's decision-making process and the standard against which such decisions are to be measured.[1]

[1] For the convenience of the reader, the following abbreviations are set forth:

On appeal, Orangetown's principal contentions are: (1) that the EPA acted unlawfully in failing to prepare an Environmental Impact Statement (EIS) before providing funds for the expansion and design of the RCSD waste treatment system, (2) that the agency acted in violation of its regulations in administering the subject federal construction grant program, (3) that the district court erred in determining that operation of the RCSD plant did not constitute a nuisance and, (4) that the court erred in dismissing plaintiff's New York State Environmental Quality Review Act (SEQRA) claim as barred by the statute of limitations. For the reasons stated hereinbelow, we affirm the district court's dismissal of the complaint.

FACTS

The proposed project against which this action is directed involves the expansion of the sewage treatment plant of the Rockland County Sewer District No. 1. The project entails the expansion of the plant's sewage collection system and the installation of modern odor-control equipment. The waste treatment plant presently services the Rockland County Sewer District No. 1 which covers approximately 80 square miles and provides sewage treat-

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CWA — Clean Water Act or Federal Water Pollution Control Act Amendments of 1972
DEC — State Department of Environmental Conservation
EA — Environmental Assessment
EID — Environmental Information Document
EIS — Environmental Impact Statement
EPA — Environmental Protection Agency
I/I — Infiltration and Inflow
mgd — million gallons per day
NEPA — National Environmental Policy Act of 1969
RCSD — Rockland County Sewer District
SEQRA — State Environmental Quality Review Act
SSES — Sewer System Evaluation Survey

ment for 160,000 residents in the Towns of Clarkstown and Ramapo and the Villages of Spring Valley and New Square. Sewage from the district is piped into and treated at the plant's main facility in the Town of Orangetown, New York. Although the County's treatment plant is situated in Orangetown, that town's sewage is treated in its own plant, which is located less than one mile from the County plant.

In recent years, it has become apparent that the RCSD plant is inadequate to meet the area's present and future needs. The already overtaxed plant has experienced several equipment breakdowns and has been allegedly associated with foul and noxious odors. After commissioning a number of waste treatment studies of the plant system, the sewer district sought to expand the capacity of the RCSD plant's sewage disposal system and related piping, modernize its equipment, and repair the present plant facilities.

The existing RCSD sewage treatment plant presently has a design capacity to treat 3,800 cubic meters (10 million gallons per day, or "10 mgd"), but present wastewater flows substantially exceed this quantity. A large part of the excessive flow at the plant is due to the infiltration of groundwater and the inflow of stormwater into the interceptor and collection system.[2] As part of the

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2 Infiltration refers to "[w]ater other than wastewater that enters a sewerage system (including sewer service connections) from the ground through such means as defective pipes, pipe joints, connections, or manholes."

Inflow refers to "[w]ater other than wastewater that enters a sewerage system (including sewer service connections) from sources such as roof leaders, cellar drains, yard drains, area drains, foundation drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage." 40 C.F.R. § 35.905.

project presently being proposed, the RCSD treatment plant will be expanded to 8,500 cu m (25 mgd) to handle existing and future sewage flows from the sewer district as well as the infiltration and inflow from groundwater and stormwater. The proposed sewerage system expansion will enable the RCSD to sewer presently unsewered areas of the RCSD, and relieve the burden on the present RCSD plant as well as on numerous smaller municipally and privately owned sewage treatment plants.

In 1976, pursuant to the EPA construction grant program, 40 C.F.R. § 35.900-35.970 (1982), the Town of Ramapo and the RCSD applied to the EPA for funding to initiate a planning process for the modernization and expansion of the RCSD waste treatment plant system.[3] The requests for funding were made pursuant to a three-step federal assistance program, the purpose of which is to assist municipalities in constructing waste treatment works. *Id.* § 35.903. Step I Funds pay the partial cost of generating a "Facilities Plan" which outlines the proposed project; Step II Funds pay the partial cost of designing the project; and Step III Funds help defray the costs of actual construction.

In response to the requests for funding, EPA made a grant of Step I Funding to the Town of Ramapo and the RCSD in 1976. During the next four years, a number of waste treatment studies or Sewer System Evaluation Sur-

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3 Due to an already overburdened sewerage system, the Town of Ramapo proposes to retire its municipal sewerage facilities and construct a system of gravity and pressure sewer lines to feed into the RCSD system. In this way, the town will provide the sewerage services needed to sewer approximately one third of the town which is presently unsewered. Although the Town of Ramapo has submitted a separate construction grant application for state and federal funding, the town's proposal is a joint undertaking with the RCSD. For purposes of this opinion, the construction projects proposed by the Town of Ramapo and the RCSD will be considered as one project.

veys (SSES) were conducted and a nine-volume Facilities Plan was prepared by the RCSD and the Town of Ramapo. During the development of the various drafts of the Facilities Plan, coordination and exchanges of information were made with consulting engineering firms directly through the RCSD or through various federal and state agencies. Other data used in the planning process were obtained from the Rockland County Planning Board, local municipalities, and surveys of the sewer district and sewer system previously sponsored by state and federal agencies. During the same period, the RCSD held public information meetings and a formal public hearing so that pertinent documentation could be presented for review by the public and various environmental groups.[4] Based on data derived at the information meetings and public hearing, adjustments to the planning were made. Still further input to the planning process was provided through frequent negotiations between the RCSD, the New York State Department of Environmental Conservation (State DEC) and the Regional Administrator of the EPA. Due to this interaction of parties, the Facilities Plan was the subject of numerous amendments, and other subsequent modifications were incorporated into the facility's design. The record shows exchanges of correspondence indicating that specific proposals were made to both the State DEC and EPA and were given careful

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[4] The record reveals that RCSD conducted several public information meetings between February 14, 1978 and June 4, 1979 in various towns located within the district. Input was sought from the public, environmentalists and various agencies of the town governments within the sewer district. On January 28, 1980, RCSD conducted a formal public hearing. At the hearing, testimony was presented by eight speakers from the Sewer District, local legislators and local officials before the floor was opened for public discussion. Materials received from the public information meetings were incorporated into the facilities planning process.

consideration. For example, the initial location of the administration building was changed to another site to overcome environmental concerns about protecting wetlands. Also, a meeting held August 6, 1980, between the agencies and RCSD led to deletion of a rear access road from the Facilities Plan, while a proposal to build prefabricated ventilated buildings over the first stage of rotating biological disks was included in the Facilities Plan to minimize adverse environmental effects.

The Facilities Plan and related documents were submitted to the State DEC for its review and approval by late summer of 1980, and the State DEC, having worked in concert with the EPA and the applicants to conform the project to federal and state agency standards, certified the Facilities Plan to the Grants Administration Branch of the EPA on August 29, 1980.

Upon receipt of the Step II grant applications from the RCSD and Ramapo, the EPA performed an environmental review of the project. On the same date, the EPA issued a public statement which concluded that the agency had determined that "no significant impact will result from the proposed action."[5] Consequently, the agency determined not to prepare an Environmental Impact Statement (EIS) before granting construction funds for the project. Instead, the EPA attached to the public notice of "no significant impact," a thirty-four page Environmental Assessment (EA), which described the facilities planning area of the project, set forth the purpose of and need for the project, identified the selected plan and its costs, evaluated the environmental conse-

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[5] The EPA was able to issue its finding of no significant impact on the same day as the state certification because RCSD had already submitted its preliminary grant application for consideration pursuant to 40 C.F.R. § 35.920-2(b).

quences of the various alternatives to expanding the present plant system and listed, *inter alia*, the projected effects on wetlands, floodplains, vegetation, and sedimentation. The EA also outlined the steps taken to minimize adverse environmental consequences and listed the Special Grant Conditions which would be attached to any federal construction grants in order to protect environmentally sensitive areas from development.

On September 30, 1980, the EPA offered a Step II design grant to the RCSD in the amount of $2,858,627 and to Ramapo in the amount of $505,950. The grants were accepted by both applicants in November, 1980. However, before the RCSD could apply for Step III construction funding, the Town of Orangetown commenced the instant action challenging the EPA's environmental processing of the applications. Plaintiff's amended complaint asserted five causes of action primarily seeking declaratory and injunctive relief. The first claim alleged that the environmental processing of the RCSD project violates the National Environmental Policy Act (NEPA); the second claim alleged that the award of Step II grants violates the Clean Water Act (CWA); the third claim alleged that the state and local defendants violated the State Environmental Quality Review Act (SEQRA) by unlawfully treating the project as excluded from the requirements of that Act; and the fourth and fifth claims sought injunctive and monetary relief for the improper operation of the County plant, which plaintiff alleged to be a nuisance.[6] In their answers, RCSD and

[6] At the start of trial, Orangetown obtained leave to amend the complaint to allege a sixth cause of action which reflected the fact that during the pretrial proceedings, EPA awarded the project a Step III, Phase I grant. The sixth claim alleges the same violations as those alleged with respect to the Step II grants and claims that EPA's issuance of the Step III, Phase I grant violates NEPA and EPA's regulations.

Ramapo asserted counterclaims seeking injunctive and monetary relief and alleged that Orangetown's own sewerage treatment plant constituted the nuisance in the area.

At pretrial proceedings, the district court granted the State DEC's motion to dismiss the third (SEQRA) claim as barred under the applicable state statute of limitations.[7] Trial on the nuisance issues and EPA's finding of no significant impact began on October 12 and continued until October 27, 1982. Upon completion of the plaintiff's case, the district court dismissed the fifth claim as against the County Defendants and EPA, and the fourth claim as against the State DEC and EPA for failure to state a claim upon which relief could be granted.[8]

On January 24 and 25, 1983, the district court issued findings of fact and conclusions of law on the NEPA, CWA and nuisance claims before dismissing the counterclaims and plaintiff's complaint in its entirety. Specifically, the court denied the relief sought after finding that, based upon the administrative record, the EPA had considered the relevant environmental factors in determining that the project would not have a significant impact on the environment. The court also concluded that EPA's action in approving the Step II and Step III, Phase I grants fully complied with NEPA and CWA provisions, as well as the EPA's construction grant regulations. In addressing the nuisance claims, the court found that the

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[7] At the completion of the plaintiff's case, the district court granted a similar motion by the County Defendants and dismissed the third cause of action in its entirety.

[8] At the commencement of trial, and following plaintiff's opening statement, the district court dismissed plaintiff's nuisance claims against the Town of Clarkstown because plaintiff had failed to allege that Clarkstown had control over the operation of the County plant.

evidence presented did not support a finding that either plant constituted a public nuisance.

DISCUSSION

On January 1, 1970, the National Environmental Policy Act (NEPA) was enacted to promote a national policy which would "encourage productive and enjoyable harmony between man and his environment." 42 U.S.C. § 4321 (1976). To achieve this national policy, NEPA requires that federal agencies proposing "major Federal actions significantly affecting the quality of the human environment" include in their proposals or recommendations an EIS which provides an assessment of the beneficial and adverse environmental impacts of the proposed action. *Id.* § 4332(2)(C). An EIS is evidence that an agency has considered the reasonably foreseeable environmental effects of a proposed major action before making a decision to take the action. However, no EIS is required where the major federal action is not "significant" within the meaning of NEPA. *Hanly v. Kleindienst*, 471 F.2d 823, 830 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973) ("Hanly II"); *Hanly v. Mitchell*, 460 F.2d 640, 644 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972) ("Hanly I"). Essential to the outcome herein is the determination whether the EPA erred in deciding that providing partial funding for the modernization and expansion of the RCSD sewage treatment system will not "significantly" affect the quality of the human environment in Rockland County Sewer District No. 1 and, in particular, in the Town of Orangetown.

Scope Of Review

The issue of whether a particular agency's action will have a "significant" effect on the environment is a substantive issue which has traditionally been left to the informed discretion of the agency proposing the action or project. *Sierra Club v. United States Army Corps of Engineers*, 701 F.2d 1011, 1029 (2d Cir. 1983). *See also Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463, 480 (2d Cir. 1971)("[T]he resolution of highly complex technological issues such as these was entrusted by Congress to the [agency] and not to the courts."), *cert. denied*, 407 U.S. 926 (1972). NEPA does, however, provide a procedural framework within which substantive judgments must be made. The courts must ensure that agencies comply with the "procedural duties" mandated by NEPA, *Kleppe v. Sierra Club*, 427 U.S. 390, 406 & n.15 (1976), while still assuring compliance with the substantive purposes of that Act.

Orangetown argues that the EPA is required to prepare an EIS which would highlight what Orangetown perceives to be the significant environmental impacts of that agency's decision to grant funds for the RCSD modernization and expansion project. Orangetown contends that the EPA has not adhered to the procedural framework dictated by NEPA, and that its finding of "no significant impact" was arbitrary and capricious.

EPA's determination of "no significant impact" is neither a rulemaking nor an adjudicatory function, but rather a factual finding made by an agency with particular expertise in environmental matters. The appropriate scope of review is therefore prescribed by the Administrative Procedure Act (APA), which provides that agency action may be overruled by a court only if the agency action was "arbitrary, capricious, an abuse of discretion,

or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1976); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971); *City of New York v. United States Department of Transportation*, slip op. at 5730 (2d Cir. Aug. 10, 1983); *Cross-Sound Ferry Service, Inc. v. United States*, 573 F.2d 725, 729 (2d Cir. 1978); *Hanly II*, 471 F.2d at 828-29.

In *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980) (per curiam), the Supreme Court addressed the question of the scope of review of agency decisions on environmental issues. Although the holding of the case is limited to the question of whether NEPA requires the agencies to elevate environmental concerns over other legitimate concerns, the Court quoted from *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978), in finding that, under NEPA, the judicially reviewable duties that are imposed on agencies are "essentially procedural," and that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences." 444 U.S. at 227. The court cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Kleppe v. Sierra Club*, 427 U.S. at 410 n.21 (quoting *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972).

Recognizing the limits of our review herein, we understand the "procedural" requirements of NEPA to be the guidelines with which this court must assess the kinds of relevant environmental factors that must be weighed. We must, therefore, look to see whether the environmental impact assessment contains the type of reasoned elaboration required to support the agency's determination of no

significant impact. In short, the appropriate role of the court is to ensure that EPA has taken a "hard look" at the environmental consequences which are likely to result from the RCSD modernization and expansion program, to be attuned to whether the EPA has considered the relevant areas of environmental concerns, and to assess whether the agency has convincingly documented its determination of "no significant impact." *See e.g., Maryland-National Capitol Park & Planning Commission v. U.S. Postal Service*, 487 F.2d 1029, 1040 (D.C. Cir. 1973).

1. *Finding of No Significant Impact*

Orangetown contends that an EIS should have been prepared by EPA because of specific impacts which it believes federal funding will have in causing a significant effect on the environment. It claims that the EPA's failure to assess, or in some instances, to more adequately assess, these impacts constituted an abuse of discretion. Specifically, Orangetown points to several matters which it claims were not given adequate consideration by the EPA: the project's impact on wetlands, floodplains, and land use; the project's alleged inadequate design; and consideration of the controversial nature of the project. These claims will be examined *seriatim*.

A. Wetlands

Orangetown claims that the sewage treatment plant modernization and expansion project will have a "significant adverse effect" on wetlands and floodplains in the area of the plant expansion and along the system of piping where new interceptors and collector sewers will be placed. In support of its contention that an EIS is required, Orangetown cites the EPA's own Review Proce-

dures for Wastewater Treatment Construction Grants Program, 40 C.F.R. § 6.506(a)(2), which requires the responsible official of the EPA to ensure that an EIS will be issued when "[t]he treatment works or collector system will have significant adverse effects on wetlands, including indirect effects, *or any major part of the treatment works will be located on wetlands*." *Id.* (emphasis added). Orangetown contends that the administrative record contains no reference to the fact that a major part of the new construction for the project, including the grit tanks and chambers, digested sludge storage, sludge and grit handling buildings, new primary settling tanks and pumping stations, will be on land which appellant's expert claims to be wetlands.

However, the proposed area to be affected by construction of the plant expansion has not been designated as a "wetlands" area by the EPA. 40 C.F.R. Part 6 App. A § 6(a)(1) provides in relevant part:

> (1) *Floodplain/Wetlands Determination*—Before undertaking an Agency action, each program office must determine whether or not the action will be located in or affect a floodplain or wetlands. The Agency shall utilize maps prepared by the Federal Insurance Administration . . . Fish and Wildlife Service . . . *and other appropriate agencies* to determine whether a proposed action is located in or will likely affect a floodplain or wetlands.

Id. (emphasis added). Under New York State law, the State DEC is the responsible "agency" for the supervision and protection of wetlands and is charged with preparing detailed maps of wetlands as part of this responsibility. *See* 6 N.Y.C.R.R. §§ 664.1, 664.7 (1980). As the Facilities Plan indicates, the State DEC has not designated the

affected area as a "wetlands." Thus, the EPA did not err in not issuing an EIS since a major part of the proposed addition to the RCSD treatment works will not be located on "wetlands" as defined by an appropriate federal or state agency.

Orangetown contends that regardless of whether the State DEC has designated the area to be a wetlands, the proposed area, populated with reeds, flooded shrubs and wooded live deciduous trees, is nonetheless a wetlands area. Orangetown further suggests that the State DEC has not designated the area as a wetlands because the affected area will be less than 12.4 acres and has not been defined as an area of "unusual local importance," both factors to be considered by the State DEC in designating areas as wetlands. *See* 6 *Id.* §§ 662.2(a), 662.4(b) (1976). However, our review of the administrative record reveals that the EPA was notified in the Facilities Plan of the "wetlands species" in the area, as well as of the relatively small size of the affected area. *See* EPA exh. D4, VII-2. Under these circumstances, and in light of the fact that the State DEC has not found the area to be of "unusual local importance," and did not designate the area as a wetlands, EPA cannot be faulted for failing to issue an EIS solely because of the wetlands effect.

We note that the Facilities Plan also indicates that a substantial area surrounding the plant has already been "disturbed" by the existing RCSD plant. As this court stated in *Hanly II*, while both the absolute and comparative effects of an agency's actions must be evaluated, it must be recognized that "[w]here conduct conforms to existing uses, its adverse consequences will usually be less significant than when it represents a radical change. . . . One more highway in an area honeycombed with roads usually has less of an adverse impact than if it were

constructed through a roadless public park." 471 F.2d at 831. Moreover, the administrative record herein indicates that principally, new interceptors were routed to follow existing rights of way and are to be placed along routes already disturbed by roadways or existing piping. *See, e.g.*, EPA exh. D3, Plates V-12, V-13. In this way, the project was designed to minimize the wetlands impact due to expansion of the sewerage system.

Finally, the record reveals that the RCSD redesigned the plant's specifications to comply with the EPA's insistence on reducing wetlands impacts. *See* Memorandum of EPA Life Scientist Peter Gruber, May 27, 1980, EPA exh. D36; *see also* EA at 9, Plaintiff's exh. 4. In short, EPA specifically analyzed the wetlands impact of the entire project, and then determined that the wetlands affected would not be significant enough to mandate preparation of an EIS. We do not find this to be an arbitrary or capricious decision.

B. Floodplains

Orangetown contends that no consideration was given by EPA to encroachment of the county plant on a nearby floodway, and that pursuant to 40 C.F.R. § 6.506(a)(4), issuance of an EIS was required. That section provides that an EIS is required where implementation of a project may directly cause or induce changes that significantly "[a]dversely affect a floodplain." This argument is devoid of merit. The EPA administrative record reveals that the actual encroachment on the floodway involves only a small portion of two buildings. *See* EPA exh. D6. It would be difficult to conclude that this *de minimis* intrusion onto the floodway could "significantly adversely affect a floodplain." The EA also indicates that EPA considered the project's effect on floodplains, and noted

with approval RCSD's efforts to route the interceptors and collectors in such a way as to avoid nearby floodplains. *See* EA at 8, Plaintiff's exh. 4. These circumstances do not suggest that EPA ignored the project's effect on floodplains and wetlands, or that the EPA abused its discretion by determining that the wetlands and floodplains impact of this project did not warrant preparation of an EIS. *See Parsippany-Troy Hills v. Costle*, 503 F. Supp. 314 (D.N.J. 1979), *aff'd mem.*, 639 F.2d 776 (3d Cir. 1980).

C. Land use impacts

Orangetown argues further that the land use impacts of the project are so significant that an EIS should have been prepared. EPA's regulations require that an EIS be issued if the treatment works will "induce significant changes . . . in . . . residential land use concentration and distribution." 40 C.F.R. § 6.506(a)(1). Apparently, Orangetown contends that expansion of the RCSD sewage treatment plant will *automatically* provide pressure for development in what is now undeveloped lands in the Town of Ramapo. Appellant's assertion lacks a substantial basis in the record and does not provide a ground to require the issuance of an EIS.

The Facilities Plan reviewed by the EPA defined in detail the scope of the project within the constraints of existing zoning regulations and contains zoning maps for the communities affected by either the plant expansion or the routing of interceptors, collectors and pipes. The Facilities Plan also contains a review of the demographic characteristics of the affected area and projected anticipated growth of the communities. Based on this information, the EPA found that the project was designed only to meet population growth expected to occur in the sewer

district, and noted in the EA that sewers were to be installed only in places where development was already taking place or was anticipated. The EA states that:

> [t]he population of the planning area is projected to increase from approximately 160,000 to 201,000 over the 20 year design period of the proposed sewerage facilities. The population projections are based on recent development plans, zoning, and a constraints analysis which excluded environmentally sensitive areas (such as wetlands, floodplains, agricultural lands and step [sic] slopes) from development.

EA at 2, Plaintiff's exh. 4. Based on the available information, the EPA concluded in the EA that although the project "may" cause an increase in the rate of development, such an increase was not sufficiently significant to require the preparation of an EIS.

Appellant has not established that expansion of the sewage treatment system will encourage a significant increase in development rather than merely meet the district's presently overburdened needs and anticipated growth. It is possible that Orangetown's position would have been stronger had it established at trial that the projected capacity of the new sewage collection system greatly exceeded the required capacity for anticipated growth. Appellant might then argue that grossly excessive capacity would be an inducement to developers to utlilize the undeveloped lands and to tap into the collection system. In light of the lack of sufficient evidence to indicate that there would be excessive capacity under the approved plan, and that the plant expansion would have the effect of inducing a significant change in land development, EPA did not abuse its discretion in not issuing an EIS. *See City of New York v. United States Department*

of Transportation, slip op. at 5726 n.14 ("The fact that effects are only a possibility does not insulate the proposed action from consideration under NEPA, but it does accord an agency some latitude in determining whether the risk is sufficient to require preparation of an EIS."); *See also Township of Parsippany-Troy Hills v. Costle*, 503 F. Supp. at 324.

D. Sewage Treatment Plant Design

Orangetown argues that the capacity of pipes carrying effluent to the sewage treatment plant (inflow) and the capacity of the discharge pipe which carries treated effluent from the plant to the Hudson River (outflow) are insufficient, and that this state of affairs will cause raw sewage to spew into the streets and streams of Orangetown. This alleged miscalculation has been criticized by appellant as further proof that EPA's finding of no significant impact was arbitrary and capricious. However, both claims are without merit.

The Facilities Plan contemplates peak flow through the plant of 53 mgd by the year 2000. However, an interim SSES study commissioned by the RCSD, and completed before issuance of the finding of no significant impact, estimated that the maximum influent in the year 2000 could reach 54.6 to 57.6 mgd. As the Facilities Plan explains, the estimated amount of a sewer pipe flow is composed of numerous variables including projected elimination of infiltration and inflow, demographic patterns and the constantly changing ways in which a community uses its water. Under these circumstances, EPA's utlilization of the 53 mgd figure at the Facilities Planning stage cannot be said to be arbitrary given the relatively small difference between the two estimates of maximum

flow in the year 2000 (53 mgd as against 54.6-57.6 mgd, or 2.6% to 8.7% variance).

With regard to the outfall pipe, Orangetown contends that the 102 mgd capacity of the outfall pipe, which is shared by the Orangetown and RCSD plants, is insufficient. However, examination of the administrative record and testimony at trial reveals appellant's argument to be a non-issue.

The Facilities Plan states that the joint outfall pipe has a capacity of 102 mgd. By contract, 42 mgd is allotted to the Orangetown plant and 60 mgd to RCSD. As Orangetown correctly states, a 1982 study commissioned by RCSD estimates that projected flow in the year 2030 could, under certain circumstances, exceed the outfall pipe's capacity of 102 mgd, and could reach as high as 104 mgd. However, this state of affairs seems unlikely to occur since the record reveals that Orangetown's total plant overflow is currently 6.95 mgd, and the projection for maximum outflow is 15.5 to 17 mgd in the year 2000. Without a significant expansion of Orangetown's own sewage treatment plant, the outflow pipe will not reach its designed capacity. Moreover, an expert in wastewater flow whose firm conducted the 1982 study testified at trial that, based on the projected flows from the Orangetown plant, there was no possibility of excess flow until at least the year 2030. Under these circumstances, we do not find that EPA acted arbitrarily in concluding that the project's design would not significantly affect the environment.

E. Public Controversy

Orangetown argues that an EIS is required because of local opposition to the plant expansion project. Opposition and a high degree of controversy, however, are not synonymous. It is to be expected that expansion of an

unpopular sewage treatment plant would generate a considerable degree of opposition; however, the term "highly controversial" as found in 40 C.F.R. § 1508.27(b)(4) (which outlines factors to be assessed in determining the "intensity" of a project, including "[t]he degree to which the effects on the quality of the human environment is likely to be highly controversial") refers to instances where "a substantial dispute exists as to the size, nature or effect of the major federal action rather than to the existence of opposition to a use." *Hanly II*, 471 F.2d at 830. To hold otherwise "would require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge [and would] surrender the determination to opponents of a federal action, no matter whether [the project is] major or not, nor how insignificant its environmental effects might be." *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973); *see also Hanly II*, 471 F.2d at 830 n.9A; *Fund for Animals v. Frizzell*, 530 F.2d 982, 988-89 n.14 (D.C. Cir. 1975). In light of the evidence herein supporting a finding of no significant impact, something more than the mere speculation that the plant expansion will increase odor problems, rather than alleviate such existing problems, is necessary before a project can be called "highly controversial." The record lacks a sufficient basis to indicate that the opposition to this project was of such an extraordinary nature as to require an EIS.

Upon examination of the administrative record relied upon by the EPA, and that agency's findings as published in the EA, we find that the EPA considered the relevant data, investigated the relevant environmental concerns, and concisely documented the evidence supporting its conclusion that funding for the RCSD system expansion would not have a significant effect on the environment.

Since the challenged findings are supported by substantial evidence, are not arbitrary and capricious, and do not represent an abuse of discretion, it is not within the competence of this court to overrule the agency's determination. *See City of New York v. United States Department of Transportation*, slip op. at 5723, 5730; *Morningside Renewal Council, Inc. v. United States Atomic Energy Commission*, 482 F.2d 234, 238 (2d Cir. 1973); *Scenic Hudson Preservation Conference v. Federal Power Commission*, 453 F.2d 463, 468 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

II. *Procedural Compliance With Construction Grant Program*

Orangetown next contends that EPA violated its regulations governing the construction grant program by omitting certain procedural steps and by not requiring compliance with the procedural aspects of the program prior to issuance of the Step II and Step III, Phase I grants. Upon careful examination of the record, we find that RCSD, as grantee, complied with the "public participation" requirements of 40 C.F.R. § 35.917-5 (1977) by holding timely public information meetings and a formal hearing; that the public had adequate opportunity to participate in the planning process; that the Facilities Plan was submitted to the State DEC, and that the State certified the Facilities Plan prior to submitting the Plan to the EPA pursuant to 40 C.F.R. §§ 35.917-7, 35.917-8; that the EA contains a wetlands/floodplains assessment; that since the Facilities Plan was commenced prior to December 15, 1979, an Environmental Information Document (EID) was not required to be prepared;[9] that the

[9] *See* 40 C.F.R. § 6.102(c)(2).

Facilities Plan had been approved by the EPA prior to the grant of Step II Funds; that the Step II grant applications from RCSD and the Town of Ramapo were filed with the EPA; and that the EPA reviewed these applications and awarded Step II Funds to the applicants.

Orangetown contends that EPA failed to assess and make specific findings required by 40 C.F.R. §§ 35.925-1 through 35.925-21.[10] These sections set forth a series of conditions that EPA must find to exist prior to the award of a grant under the construction grants program for sewage treatment works. We note, however, that while a clear and concise document outlining *seriatim* the agency's response to the demands of Section 35.925 would be of considerable assistance to a court's review of EPA's actions, the regulations do not require that the agency's actions be set down in any particular order or form, or even that its determinations be made in writing.

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10 Only three of the 21 determinations were contested in the district court. Plaintiff's amended complaint only challenged compliance with subdivisions 35.925-7 ("Design"), 35.925-8 ("Environmental Review"), and 35.925-13 ("Sewage Collection System"), as determinations which the Regional Administrator had failed to properly address prior to an award of construction grant funds. These three issues were among Orangetown's claims as the action proceeded to trial. More than two months after completion of the trial, on January 6, 1983, Orangetown moved pursuant to Fed. R. Civ. P. 15(b) to conform its pleadings to the proof adduced at trial to place in issue the claim that EPA "did not make the determinations required by 40 C.F.R. § 35.925." On January 24, 1983, the district court denied the motion. Since inclusion of the 17 remaining determinations of Section 35.925 were not tried by the parties' express or implied consent, and were not presented in such a way that the defendants could fairly "defend. . . [and] offer any additional evidence if the case were to be retried on a different theory," *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1086 (2d Cir. 1977) (quoting 3 Moore's *Federal Practice* ¶ 15.13[2], at 993 (2d ed. 1966)), we find the district court did not abuse its broad discretion in denying the motion. "The purpose of Rule 15(b) is to allow the pleadings to conform to issues actually tried, not to extend the pleadings to introduce issues inferentially suggested by incidental evidence in the record." *Browning*, 560 F.2d at 1086.

All that is necessary is that a reviewing court be able to trace from the written record the path followed by the agency in deciding to take a particular action. *See generally Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). Our review of the EPA administrative record supports the district court's finding that "[t]aken as a totality the administrative record reflects that the objectives of 40 C.F.R. § 35.925 were accomplished and [that] therefore EPA complied with its terms."

III. *Nuisance Claim*

Orangetown claims that the district court committed clear error in dismissing its public nuisance claim against the County defendants. We find the district court correctly dismissed appellant's nuisance claim.

Orangetown alleged at trial that operation of the County plant constituted a nuisance by virtue of its frequent equipment failures, which allegedly caused foul and noxious odors to permeate the air. After conducting a non-jury trial, the district judge concluded that *both* the Town and County waste treatment plants had generated offensive odors. Since the two plants are situated within 1800 feet of each other, the district judge found he could not conclude that the odors emanating from one plant alone created a "significant and unreasonable interference with public rights." *See, e.g., Copart Industries, Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 362 N.E.2d 968, 394 N.Y.S.2d 169 (1977); *New York Trap Rock Corp. v. Town of Clarkstown*, 299 N.Y. 77, 85 N.E.2d 873 (1949).

Both parties offered evidence at trial from lay and expert witnesses that the other party's waste treatment plant was poorly operated and emitted foul odors.

Further, several witnesses testified that they were not prepared to identify which of the plants was the source of the odors they had experienced. The district court credited this testimony and concluded that it could not make an unequivocal finding of causation. Therefore, the district judge dismissed plaintiff's nuisance claim. From our review of the evidence presented at trial, we find no basis for overturning the district court's ruling that Orangetown's evidence, taken as a whole, failed to prove by a preponderance that the county plant operation resulted in a public nuisance.

IV. *SEQRA Claim*

Orangetown contends that the district court erred in dismissing its third cause of action which sought to enjoin the State DEC from granting the state portion of construction funding for the RCSD sewage treatment plant expansion. Appellant's third cause of action alleges that the State DEC did not comply with the requirements of SEQRA by granting state funds and certifying the project for federal funding, without requiring that an EIS be prepared.

The district court found that Orangetown's SEQRA challenge was a claim against a New York State agency and thus was governed by the statute of limitations as set forth in N.Y. Civ. Prac. Law § 217 (McKinney 1972).[11]

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11 N.Y. Civ. Prac. Law § 217 provides:

Unless a shorter time is provided in the law authorizing the proceeding, *a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding* upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty; or with leave of the court where the petitioner or the person whom he represents, at the time such determination became final and binding upon him or at the time of

The court dismissed the SEQRA claim against the State DEC on July 26, 1982, and wrote:

> Plaintiff's third claim for relief raises a state law issue. Where state created rights are being contested, the limitations period is governed by state statute. *See, e.g., Guaranty Trust Co. v. York*, 326 U.S. 99 (1945). In this instance, the appropriate statute is section 217 of the New York Civil Procedure Laws and Rules which allows that proceedings against a state officer must be commenced "within four months after the determination to be reviewed becomes final and binding . . . ."
>
> On September 11 and 12, 1980, the state defendants submitted and certified the application attendant to the Orangetown plant to the Grants Administration Branch of the EPA. That activity concluded the state defendant's obligations pursuant to SEQRA, and the commencement of the action in February, 1981, was beyond the statute of limitations. The claim is therefore barred. *Reisel, Inc. v. Exxon Corp.*, 349 N.Y.S.2d 14, 20 (2d Dept. 1973), *aff'd*, 36 N.Y.2d 888 (1975).

Because we find the determination of the district court to be correct, we affirm the dismissal of appellant's third cause of action against the State DEC.

Appellant's complaint, filed February 26, 1981, was filed approximately five months after the State DEC's approval of RCSD's Step II grant application. Orangetown argues, however, that its late filing should be no bar since a challenge to a SEQRA determination is not

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such refusal, was under a disability specified in section 208, within two years after such time.

(emphasis added).

reviewable under a CPLR Article 78 proceeding. Appellant further contends that the district court misinterpreted its third cause of action, which it alleges is actually a claim for injunctive and declaratory relief, and that thus, a six-year statute of limitation should be applied. This argument is without foundation or merit.

CPLR Section 217, or Article 78 proceedings, are applicable to final state determinations under SEQRA. *See, e.g., In re Town of Yorktown v. New York State Department of Mental Hygiene*, 92 A.D.2d 897, 459 N.Y.S.2d 891 (2d Dept. 1983); *In re State of New York Northeastern Queens Nature and Historical Preserve Commission v. Flacke*, 89 A.D.2d 928, 453 N.Y.S.2d 773 (2d Dept. 1981). Therefore, Orangetown's challenge to the State DEC certification was required to be made within four months of that agency's final determination.

Orangetown also errs in assuming that it can avoid the applicable bar by labeling its action as one seeking declaratory or injunctive relief. New York law requires its courts to look to the substance of a claim to determine which statute of limitations applies. If this examination reveals that a claim for declaratory relief could have been resolved through another form of action which has a specific limitations period, the specific period of time will govern. *See Press v. County of Monroe*, 50 N.Y.2d 695, 409 N.E.2d 870, 431 N.Y.S.2d 394 (1980); *Solnick v. Whalen*, 49 N.Y.2d 224, 401 N.E.2d 190, 425 N.Y.S.2d 68 (1980). Therefore, we find appellant has not complied with the applicable specific four month statute of limitations period provided in N.Y. Civ. Prac. Law § 217, and we affirm the district court's dismissal of the third cause of action accordingly.

The judgment is affirmed in all respects. Each party shall bear its own costs.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWN OF ORANGETOWN,

Plaintiff,

-against-

ANNE GORSUCH, Individually and as Administrator of the United States Environmental Protection Agency; RICHARD DEWLING, Individually and as Regional Administrator of the United States Environmental Protection Agency; ROCKLAND COUNTY SEWER DISTRICT NO. 1; COUNTY OF ROCKLAND; TOWN OF RAMAPO; TOWN OF CLARKSTOWN; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and ROBERT FLACKE, as Commissioner of the New York State Department of Environmental Conservation,

Defendants.

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81 Civ. 1147 (RO)

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT*

1. This is an action brought by the Town of Orangetown against Rockland County, the Rockland County Sewer District No. 1 ("RCSD"), the Town of Ramapo, the New York State Department of Envioronmental Conservation ("DEC") and the United States Environmental Protection Agency ("EPA") to enjoin the expansion of a sewage treatment plant and related sewage piping.

2. The objectives of the project, which has been undertaken by RCSD with EPA grant assistance, are the improvement of water quality in the area, the decrease of harmful characteristics of

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* The fact that certain proposed findings herein were excised by the Court does not mean that they were rejected or that there was no evidence to support them but merely that they were not deemed necessary for the disposition in the case.

effluent discharged into the Hudson River, and the upgrading of RCSD's plant in Orangetown.

3. RCSD comprises appriximately 80 square miles in area and constitutes approximately one half of the County. The population of the area served by the district is approximately 160,000. RCSD provides sewage service to residents in the townships of Clarkstown and Ramapo and the Villages of Spring Valley and New Square.

4. Paragraph omitted.

5. It has been apparent for a number of years that the capacity of the RCSD plant is insufficient to meet the area's present and future needs.

6. Paragraph omitted.

7. The plant also experienced odor problems and other operational difficulties.

8. Paragraph omitted.

9. Because of the foregoing, RCSD has needed to expand the capacity of its sewage disposal system and related piping and update its facilities.

10. RSCD and the Town of Ramapo applied to EPA for funding to initiate a planning process for an expanded wastewater treatment work, interceptor system and collection system in 1976. Facilities planning grants to both applicants were made later that year.

11. The process by which facilities plans were prepared extended over a four-year period and involved EPA, DEC and RCSD. RCSD and the Town of Ramapo hired a number of consultants to aid in the accomplishment of this task. The administrative record contains Facilities Plans, a Sewer System Evaluation

Survey, and studies of engineering and environmental aspects of the project.

12. The Facilities Plans were submitted to EPA in draft. Thereafter, numerous amendments of the proposal were accomplished. A number of design changes were instituted specifically to answer EPA's concerns relating to environmental impacts.

13. Between 1976 and 1980, public meetings and one public hearing concerning the project were held. Plaintiff participated actively in this process.

14. Paragraph omitted.

15. The New York State Department of Environmental Conservation approved the Facilities Plan on August 29, 1980.

16. EPA notified the public that, in accordance with the procedures for the preparation of environmental impact

statements (under the National Environmental Policy Act, 42 U.S.C. §4332), it had reviewed the project, and issued a Finding of No Significant Impact ("FNSI"). Attached to the public notice was the agency's Environmental Assessment ("EA"). The agency further stated that no action would be taken on the project for at least 30 days after the date of the FNSI.

17. The EA described the facilities planning area and the project in detail, set forth the purpose of and need for the project, identified the selected plan and its costs, evaluated various alternatives, described the environmental consequences of the plan and the steps to minimize adverse environmental effects and stated various grant conditions to accomplish minimization of environmental consequences.

18. The EA evaluated whether the project would induce significant population changes and concluded only that the proposed project "may" cause an increase in the rate of development, however of serving that the plan calls for sewers in areas already developed or with an already strong potential for development. The EA concluded that there would be no significant land use effects (and no significant secondary air, water and wildlife effects through induced development). Special grant conditions eliminating adverse land use consequences were listed. Wetlands effects were evaluated with grat care as were issues relating to interbasin transfer and odor control.

19. On September 12, 1980, RCSD and Ramapo submitted their formal Step II

grant applications to EPA and the agency approved them on September 30, 1980.

20. Paragraph omitted.

21. Paragraph omitted.

22. Paragraph omitted.

23. Paragraph omitted.

23. Paragraph omitted.

25. Paragraph omitted.

26. Paragraph omitted.

29. Paragraph omitted.

30. Paragraph omitted.

31. Paragraph omitted.

32. All sewage treatment plants can be expected to generate some local opposition. This proposed plant was no exception. I do not, however, find it to be controversial in the legal sense.

33. Paragraph omitted.

34. The administrative record demonstrates that EPA appropriately considered whether the project provides for the best practicable waste treatment

technology, whether the project has sufficient reserve capacity, whether the design, size and capacity of the project are cost effective, whether the sewer collection system is subject to excessive infiltration, whether the sewage collection system has sufficient capacity as planned to adequately treat the collected sewage, whether the sewage collection system is cost effective, whether the sewage compositing proposed was appropriate and whether the environmental review of the project complied with the requirements of NEPA.

35. Paragraph omitted.

36. Paragraph omitted.

37. Paragraph omitted.

38. Paragraph omitted.

39. Paragraph omitted.

40. Paragraph omitted.

THE LAW

41. Section 102(2)(C) of NEPA, 42 U.S.C. §4332(2)(C), requires a federal agency to prepare an environmental impact statement ("EIS") for every major federal action significantly affecting the quality of the human environment. No EIS is required, however, unless the major federal action is "significant" within the meaning of NEPA, see 42 U.S.C. §4332(2)(C); Hanly v. Kleindienst, 471 F.2d 823, 830 (2d Cir. 1972), cert. denied 412 U.S. 908 (1973) ("Hanly II"); Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir. 1972) ("Hanly I").

42. In order to prevail, plaintiff must prove that the EPA's decision not to prepare an EIS was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "without observance of procedure re-

quired by law," see Cross-Sound Ferry Service, Inc. v. United States, 573 F.2d 725, 731 (2d Cir. 1974); see also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Rucker v. Willis, 484 F.2d 158 (4th Cir. 1973); Hanly v. Kleindienst (Hanley II), 471 F.2d 823, 828-29 (2d Cir. 1973), cert. denied, 412 U.S. 908 (1973); see also 5 U.S.C. §701 et seq.

43. This is a "highly deferential standard" which "presumes agency action to be valid." Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 34 (D.C. Cir. 1976), cert. denied, 426 U.S. 941 (1976); see also Citizens to Preserve Overton Park, supra, 401 U.S. at 415.

44. In determining whether a major federal action significantly affects the environment, the district court should review whether the agency, in exercising

its broad discretion considered factors such as

> (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area. Hanly v. Kleindienst, supra, 471 F.2d at 830.

45. EPA is presumed to have considered all the material before it prior to the award of the challenged Step II grant. See Natural Nutritional Food Association v. FDA, 491 F.2d 1141, 1145-46 (2d Cir.), cert. denied, 419 U.S. 874 (1974). See also Yaretsky v. Blum, 629 F.2d 817, 823 n.4 (2d Cir. 1980), cert. granted, ____U.S.____ (1981).

46. Thus, the court's role is to insure that EPA has taken a "hard look"

at the environmental consequences which are likely to result from the project, determine whether EPA has identified "the relevant areas of environmental concern" and whether the agency has convincingly supported its determination that any impacts are insignificant or that program changes have rendered potentially significant impacts insignificant.

47. Plaintiff bears the burden of proof on each of these issues. Sierra Club v. Lynn, 502 F.2d 43, 52 (5th Cir. 1974), cert. denied, 421 U.S. 994 (1975); Hiram Clarke Civic Club, Inc. v. Lynn, 476 F.2d 421, 425 (5th Cir. 1973); Simmons v. Grant, 370 F. Supp. 5, 12 (S.D. Tex 1974).

48. Finally, in its review, the district court is not empowered to substitute its judgment for that of the agency, Vermont Yankee Nuclear Power

Corp. v. NRDC, 435 U.S. 519 (1978); Kleppe v. Sierra Club, 427 U.S. 390, 410 n. 21 (1976).

49. If EPA has considered the relevant factors and reached a conclusion that is not a clear error of judgment, its action must be affirmed. Citizens to Preserve Overton Park v. Volpe, supra, 401 U.S. at 416-18.

50. In cases arising under NEPA, the meaning of "significantly" in the phrase "significantly affecting the quality of the human environment" presents a mixed question of law and fact. Hanly v. Kleindienst, supra, 471 F.2d at 828.

MIXED FINDINGS OF FACT AND CONCLUSIONS OF LAW

51. The analysis of wetlands, floodplains, land use impacts, sewage treatment plan design, benefits to

landowners, and sludge handling procedures contained in the administrative record demonstrates that EPA considered the relevant factors in determining whether the project would have a significant impact on the environment.

52. The issuance of the FNSI by EPA was an appropriate exercise of administrative discretion and was not arbitrary and capricious.

53. The EA is in compliance with the requirements of NEPA and 40 C.F.R. §6.507(c), and incorporated within it is an assessment of impacts on floodplains and wetlands in accordance with the requirements of 40 C.F.R. §6.302(a) and (b) and 40 C.F.R. Part 6 Appendix A.

54. EPA complied with the public hearing requirements of NEPA and the Clean Water Act and the applicable

regulations including 40 C.F.R. Part 25; 40 C.F.R. Part 35, Subpart F; 40 C.F.R. §6.400(a), and §6504(a); and 40 C.F.R. §35.917-5.

55. The administrative record reflects that the EPA considered those elements of the project required to be analyzed by 40 C.F.R. §35.925. Although there is no separate document listing specific determinations with respect to every element specified in 40 C.F.R. 35.925, taken as a totality the administrative record reflects that the objectives of 40 C.F.R. §35.925 were accomplished and therefore EPA complied with its terms.

56. In any event, given the fundamental fairness and public consequence test applicable here, Sierra Club v. Hennessy, Dkt. No. 82-6175 (2d Cir. Dec. 6, 1982) (Slip Op. at 11); see also

Weinberger v. Romero-Barcelo, 50 U.S.L.W. 4434, 4435 (April 27, 1982). I find that the issuance of an injuction would be wholly inappropriate in this case. The existing RCSD plant is overloaded, and expansion is necessary to protect local water quality and eliminate harmful characteristics from the effluent discharged by the County into the Hudson; the expanded STP will contain a wide variety of equipment to control odors inherent in the operation of the plant, thus benefiting the residents of Rockland County as a whole, and those of the Town of Orangetown in particular; substantially all of the new RCSD interceptors and the Ramapo collection system have been routed along existing rights-of-way in a manner minimizing wetlands and floodplains effects; grant conditions prohibit hook-ups in the Rockland County sewer

system that have the potential for environmental damage; the expansion of the current RCSD plant appears to be the only economically feasible method for addressing the area's needs; and finally, the wetlands and associated areas to be used in the expansion are not substantial.

57. Paragraph omitted.

58. Paragraph omitted.

59. Any testimony of Plaintiff's witnesses, Arnold Fleming and Donald Brenner inconsistent with any findings herein is rejected by the Court.

60. The foregoing constitutes the District Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.

61. Plaintiff's request for declaratory and injunctive relief is denied and the complaint is dismissed

with costs and disbursements. Submit judgment on notice.

Dated: New York, New York
January 24, 1983

SO ORDERED:

_____
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWN OF ORANGETOWN,

Plaintiff,

-against-

ANNE GORSUCH, Individually and as Administrator of the United States Environmental Protection Agency; RICHARD DEWLING, Individually and as Regional Administrator of the United States Environmental Protection Agency; ROCKLAND COUNTY SEWER DISTRICT NO. 1; COUNTY OF ROCKLAND; TOWN OF RAMAPO; TOWN OF CLARKSTOWN; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and ROBERT FLACKE, as Commissioner of the New York State Department of Environmental Conservation,

Defendants.

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

81 Civ. 1147 (RO)

The following Findings of Fact and Conclusions of Law relate to plaintiff Town of Orangetown's fourth claim for relief against the county defendants (Rockland County Sewer District No. 1, the County of Rockland and the Town of Ramapo) in the above-entitled action, and the county defendants' first counterclaim against plaintiff. These claims are the contentions by each party that the sewage treatment plant operated by the opposing party creates a nuisance. The Court in reaching the determination herein has considered the evidence adduced at trial from October 12, 1982 until October 27, 1982. Parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to present evidence bearing on the issue, to argue on the evidence and the law. The Court has

fully considered the complaint, answer, evidence, argument and briefs of counsel. Upon the entire record, the Court makes the following supplemental findings of fact and conclusions of law in addition to those already in the record.

FINDINGS OF FACT*

1. The Rockland County Sewer District No. 1 operates a sewage treatment plant (hereinafter "County Plant") located in Orangetown, New York. The Town of Orangetown also operates a sewage treatment plant (hereinafter "Town Plant"), located in Orangetown,

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* The fact that certain findings are excised does not mean they are rejected, but merely that they were not deemed necessary to the resolution of the issues on these claims.

approximately 1800 feet away from the County Plant.

2. Persons who reside or work in Orangetown have experienced sewage odors, emanating from the vicinity of the two sewage treatment plants in the applicable period, 1978 to the present.

3. Sewage treatment plants in general may be expected on occasion to generate unpleasant odors by virtue of the material they process.

4. Several witnesses testified that they were not prepared to identify with certainty which of the two plants was the source of the odors they experienced.

5. Other witnesses who were able to trace odors to the County Plant did not demonstrate a frequency or intensity of odors beyond that to be expected of a sewage treatment plant.

6. The odor complaint file kept by the County Sewer District reveals relatively few odor complaints since 1978. The file also demonstrates that many odor incidents have not been attributed to any definite source; attirbutable odors have been traced both to the County Plant and the Town Plant.

7. Paragraph omitted.

8. Paragraph omitted.

9. Other odors have been traced specifically to the gate of the Town Plant, and on one ocassion the odor was found to be emanating from the primary clarifiers of the Town Plant.

10. Paragraph omitted.

11. Paragraph omitted.

12. An odor study found that the odor control equipment at the Town Plant for the primary clarifier area is not always adequate.

13. The odor study performed by the firm of Hazen and Sawyer in 1975 made recommendations for improvements in odor control at both plants.

14. The County Sewer district demonstrated that, in response to the Hazen and Sawyer recommendations, it has made structural changes in the plant for odor control, and equipment improvements. It has taken steps of its own initiative to improve odor handling, including covering the wetwell.

15. There was no credible evidence of personnel incompetence or failure to employ best efforts to achieve proper operation and maintenance in the County Plant.

16. The failure of a sewage treatment plant to meet its BOD and SS permit requirements is not by itself evidence that odors are being created. Both the

County Plant and the Town Plant have from time to time failed to meet their permit requirements.

17. The evidence in the aggregate shows that both plants have had the potential to generate some unpleasant odors in the past, and both plants have from time to time generated odors in the years since 1978.

CONCLUSIONS OF LAW

1. A conclusion that the operation of the County Plant constituted a nuisance would require a finding that the County Plant has caused an unreasonable and significant interference with the general rights of the public including public health, safety or comfort.

2. In view of the finding that both the Town and County Plants have gener-

ated offensive odors in the area, a conclusion that either plant is a nuisance would require a finding that the odors emanating from that plant alone creates a significant and unreasonable interference with public rights.

3. The evidence presented does not permit a finding of such interference. Consequently, I do not conclude that the Rockland County Sewage Treatment Plant constitutes a nuisance.

4. The evidence pesented does not permit a finding of such interference by the Orangetown Sewage Treatment Plant either. I therefore do not conclude that it constitutes a nuisance.

5. Plaintiff's fourth claim for relief and the County Defendants' first counterclaim are hereby dismissed.

Dated: New York, New York
January 25, 1983

SO ORDERED:

_____
Hon. Richard Owen

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWN OF ORANGETOWN,

Plaintiff,

-against-

ANNE M. GORSUCH, et al.,

Defendants.

OPINION AND ORDER

81 Civ. 1147 (RO)

OWEN, District Judge

Defendant moves to dismiss plaintiff's complaint for failure to state a claim. Except as to plaintiff's third claim for relief, defendant's motion is denied. As to plaintiff's third claim, defendant's motion is granted.

Plaintiff, the Town of Orangetown ("Orangetown"), is a municipality in Rockland County. A sewage treatment

plant is located there. By this suit for declaratory and injunctive relief, plaintiff seeks to prevent the expansion of that plant.

Plaintiff has named as defendants in this action a number of local, state, and federal parties who play a role in the expansion of the plant. The motion before me today has been brought by only one of those defendants, Robert Flacke, the Commissioner of the New York Department of Environmental Conservation (the "state defendant"). Pursuant to a stipulation endorsed by this court on July 9, 1981, Commissioner Flacke is now before me only in his official capacity.

The sewage treatment plant in Orangetown presently services not only Orangetown itself but also the neighboring Rockland County communities of Ramapo and Clarkstown. Domestic commercial,

and industrial sewage from these three communities flows across the County to the plant in Orangetown where it is treated. Plaintiff contends that the existing plant is already a public nuisance and that the expansion of the plant will only aggravate that nuisance by encouraging further development in the County and thereby increasing the burden on the Orangetown plant and its environs.

Plaintiff's attack challenges the funding of the proposed expansion. Construction of sewage treatment facilities is a costly undertaking. Plaintiff estimates that the total cost of the Orangetown expansion will reach approximately $120 million with funding to be provided from federal, state, and local revenues. Combined, the federal

and local contributions to the plant will total $100 million.

The Environmental Protection Agency will administer the federal contribution to the Orangetown plant. Where the EPA administers a program such as the Orangetown expansion, it provides money in three stages. At Stage One a grant is provided for facilities planning; Stage Two funds the preparation of construction drawings and specifications; construction funds are provided by a Stage Three grant. Plaintiff seeks to cut off the expansion of the Orangetown plant at Stage Two.

The essence of this lawsuit, thus, is the allegation that defendants cannot move forward with the expansion of the plant because defendants have not complied with the requisite federal and state environmental requirements and

because the plant constitutes a continuing public nuisance.

Plaintiff asserts four claims for relief. First, plaintiff alleges that defendant violated the National Environmental Protection Act, 42 U.S.C. §4331, et seq.; second plaintiff alleges a violation of the Clean Water Act, 33 U.S.C. §1281, et seq.; plaintiff's third claim alleges a violation of the New York State Environmental Quality Review Act, ECL §8-0101, et seq.; plaintiff's final claim alleges that the proposed expansion of the plant will constitute a public nuisance.

Before me is the state defendant's motion to dismiss plaintiff's suit as it applies to him in his official capacity. Flacke contends that the Eleventh Amendment bars the prosecution of all of plaintiff's claims in federal court and,

moreover, that plaintiff is prohibited from bringing any of its claims as parens patriae for its residence. As to plaintiff's individual claims for relief, the state defendant contends: first, that plaintiff's first and second claims must be dismissed pursuant to Rule 12(b)(6); second, that plaintiff's third claim for relief must be dismissed because it was filed beyond the applicable four-month limitations period set forth in Section 217 of the New York Civil Procedure Law and Rules; and, third, that plaintiff's fourth claim for relief must be dismissed because the alleged public nuisance has been caused not by the proposed expansion but by the past operation of the existing plant. I consider each of state defendant's arguments seriatim.

A. The Eleventh Amendment does not bar equitable relief as against the state defendant.

In Flacke's motion papers as first filed with this court, he contended that the Eleventh Amendment barred all of the remedies sought by plaintiff, e.g., money damages, and injunctive and declaratory relief. Since that date, however, the parties have agreed to drop the fifth claim alleging money damages, thus limiting plaintiff's claims against the state defendant to those alleging equitable relief. Flacke nevertheless continues to contend that the Eleventh Amendment bars relief.

The Eleventh Amendment however, does not bar a federal court from granting prospective equitable relief as against a state official. See Edelman v. Jordan, 415 U.S. 651 (1974). Moreover,

"[i]t has long been familiar doctrine . . . that the Eleventh Amendment does not prevent a federal court from directing a State official to bring his conduct into conformity with federal law." Byram River v. Village of Port Chester, 394 F. Supp. 618, 628 (S.D.N.Y. 1975).[1]/

B. While Plaintiff may not assert any claims as parens patriae, it may still maintain this action in order to vindicate its own proprietary rights.

As a second ground for dismissing this action as to him entirely, Flacke lists plaintiff's inability to bring suit as parens patriae. While I agree

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[1] State defendant has mistakenly relied on the broad principle as repeated in the Byram River case that, "In an action against a State the Eleventh Amendment acts as an absolute bar to suit unless the State has waived its immunity." Byram River , supra at 624. While that amendment is undeniably true it makes no comment about suits brought against state officials. See Ex parte Young, 209 U.S. 123 (1908).

that plaintiff may not maintain this action as parens patriae it may do so to protect its own proprietary rights.

Under the common law concept of parens patriae, the federal and state governments have traditionally been vested with the power and duty to bring suits in order to vindicate interests of their citizens. Conversely, "political subdivisions such as cities and countries, whose power is derivative and not sovereign, cannot sue as parens patriae . . . ." In re Multi-district Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 131 (9th Cir. 1973). State defendant is therefore correct that plaintiff cannot maintain this action as parens patriae, but plaintiff is not thereby totally disabled from maintaining this action. Paragraph Three of the complaint states that "Orangetown brings this suit acting

on its own behalf and as parens patriae for its residents." Thus, even assuming that plaintiff cannot bring this action on behalf of its residents, plaintiff's claims nevertheless survive because political subdivisions such as cities and counties may "sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants."

C. Plaintiff's first and second claims state claims upon which relief can be granted.

Defendant next argues that plaintiff's first and second claims must be dismissed because the relief sought can be provided only by the federal defendants. See Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971).

On the contrary, "[i]t is well settled that non-federal parties may be

enjoined, pending completion of an EIS, where those entities have entered into a partnership or joint venture with the Federal Government, and are this recipients of federal funding." Biderman v. Morton, 497 F.2d 1141, 1147 (2d Cir. 1974). The state defendant is such a partner of the federal defendants in the sewage treatment plant; it is a recipient of federal funds for the completion of the plant. Adequate relief for plaintiff, if it is to be granted, necessarily must reach all members of the Orangetown venture. Therefore, I conclude that plaintiff may maintain its first and second claims for relief against state defendant.

D. Plaintiff's state law claims are barred by the statue of limitations.

State defendant next contends that plaintiff's third claims for relief

pursuant to SEQRA should be dismissed because under the applicable four-month limitations period plaintiff's claim is time-barred. I concur both with defendant's choice of a limitations period and with the conclusion that plaintiff has failed to timely assert this claim.

Plaintiff's third claim for relief raises a state law issue. Where stated-created rights are being contested, the limitations period is governed by state statute. See, e.g., Guaranty Trust Co. v. York, 326 U.S. 99 (1945). In this instance, the appropriate statute is Section 217 of the New York Civil Procedure Law and Rules which allows that proceedings against a state officer must be commenced "within four months after the determination to be reviewed becomes final and binding...."

On September 11 and 12, 1980, the state defendant submitted and certified the application attendant to the Orangetown plant to the Grants Administration Branch of the EPA. That activity concluded the state defendant's obligations pursuant to SEQRA, and the commencement of the action in February, 1981, was beyond the statute of limitations. The claim is therefore barred. Reisel, Inc. v. Exxon Corp., 349 N.Y.S.2d 14, 20 (2d Dept. 1973), aff'd 36 N.Y.2d 888 (1975).

Finally, defendant contends that plaintiff's fourth claim for relief must be dismissed because the challenged conduct cannot be attributed to the state defendant and because a town "may not bring an action to restrain a public nuisance which causes damage to the private property of its citizens." New

York Trap Rock v. Town of Clarkstown, 299 N.Y. 77, 83, (Ct. App. 1949) (emphasis in original).

While plaintiff's fourth claim for relief, as it applies to the state defendant, is not a model of drafting expertise, plaintiff does allege that "The operation of the County plant constitutes and will continue to constitute constitute, a public nuisance." Complaint ¶94. Specifically, plaintiff alleges that the operation of the plant is causing both injury to the health of its citizens, (¶91), and diminution of property values. (¶92).

State defendant correctly relies on New York Trap Rock, supra, as grounds for dismissal of the fourth claim to the extent it asserts a diminution of private property values as distinguished from a diminution of the value of its

own properties. New York Trap Rock clearly acknowledges, however, that a municipality's right to sue does extend to an action grounded upon public nuisance law asserting injury to the health of its citizens.

An order may be submitted effectuating all the foregoing.

United States District Judge

Dated: July 26, 1982
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWN OF ORANGETOWN,

Plaintiff,

-against-

ANNE GORSUCH, Individually and as Administrator of the United States Environmental Protection Agency; RICHARD DEWLING, Individually and as Regional Administrator of the United States Environmental Protection Agency; ROCKLAND COUNTY SEWER DISTRICT NO. 1; COUNTY OF ROCKLAND; TOWN OF RAMAPO; TOWN OF CLARKSTOWN; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and ROBERT FLACKE, as Commissioner of the New York State Department of Environmental Conservation,

Defendants.

ORDER

81 Civ. 1147 (RO)

Defendants New York State Department of Environmental Conservation ("DEC")

and Robert Flacke, individually and as Commissioner of the New York State Department of Environmental Conservation, having moved this Court for an order dismissing the complaint as against them, pursuant to Rules 12(b)(1), (3) and (6) of the Federal Rules of Civil Procedure; and defendants New York State Department of Environmental Conservation and Robert Flacke having entered into a stipulation with plaintiff Town of Orangetown dated July 8, 1981, and endorsed by this Court on July 9, 1981, which provided, among other things, that:

1. Plaintiff will voluntarily discontinue the fifth claim asserted in the complaint as against the state defendants, and will voluntarily discontinue the first, second, third and fourth claims asserted in the complaint as against both DEC and Robert Flacke, Individually; and plaintiff will, at an appropriate time, formally amend or supplement the Complaint to implement such discontinuances.

2. In light of the discontinuances described in Paragraph 1 above, the state defendants have agreed to withdraw so much of their motion as (i) relates to the fifth claim for relief; and (ii) relates to the first, second, third and fourth claims for relief against DEC or Robert Flacke, Individually;

3. The motion before the Court will be limited to the sufficiency of the claims asserted in the first four claims for relief against defendant Robert Flacke, as Commissioner of the DEC;

and upon reading the summons and complaint, dated February 2, 1981; the notice of notice to dismiss, dated April 15, 1981; the memorandum in support of the motion to dismiss, dated April 15, 1981; plaintiff's memorandum of law in opposition to motion to dismiss; and the stipulation dated July 8, 1981; and the Court having heard argument of counsel for the respective parties on July 17, 1981; and the Court after due deliberation having filed its opinion and order dated July 26, 1982 which granted the

motion, as limited by the stipulation, in various respects; it is

ORDERED, that plaintiffs third claim for relief be and the same is hereby dismissed; and it is further

ORDERED, that plaintiff's claims for relief as parens patriae be and the same are hereby dismissed; and it is further

ORDERED, that plaintiffs fourth claim for relief is dismissed to the extent that it seeks to recover for diminution of the value of properties not owned by plaintiff; and it is further

ORDERED, that the motion of the New York State Department of Environmental Conservation and Robert Flacke is in all other respects denied; and it is further

ORDERED, that plaintiff Town of Orangetown serve an amended complaint in accordance with the stipulation dated July 8, 1981 within five (5) days of

entry of this order, and that defendants serve answers within ten (10) days of receipt of said amended complaint.

Dated: New York, New York
September 7, 1982

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWN OF ORANGETOWN,

Plaintiff,

-against-

ANNE GORSUCH, Individually and as Administrator of the United States Environmental Protection Agency; RICHARD DEWLING, Individually and as Regional Administrator of the United States Environmental Protection Agency; ROCKLAND COUNTY SEWER DISTRICT NO. 1; COUNTY OF ROCKLAND; TOWN OF RAMAPO; TOWN OF CLARKSTOWN; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and ROBERT FLACKE, as Commissioner of the New York State Department of Environmental Conservation,

Defendants.

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Except to the limited extent there is consent, the motion is denied.

SO ORDERED

1/24/83 HON. RICHARD C. OWEN

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TOWN OF ORANGETOWN,

Plaintiff,

-against-

ANNE GORSUCH, Individually and as Administrator of the United States Environmental Protection Agency; RICHARD DEWLING, Individually and as Regional Administrator of the United States Environmental Protection Agency; ROCKLAND COUNTY SEWER DISTRICT NO. 1; COUNTY OF ROCKLAND; TOWN OF RAMAPO; TOWN OF CLARKSTOWN; NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION; and ROBERT FLACKE, as Commissioner of the New York State Department of Environmental Conservation,

Defendants.

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JUDGMENT

This action came on for trial before the Court without a jury, Honorable

Richard Owen, District Judge, presiding on October 12, 1982 until October 27, 1982, and was argued by counsel.

On October 13, 1982, during the course of the trial, the court dismissed the fourth and fifth claims of plaintiff as against defendant Town of Clarkstown.

On October 21, 1982, at the conclusion of plaintiff's direct case, the court dismissed plaintiff's third claim, relating to the State Environmental Quality Review Act as against all defendants; dismissed plaintiff's fourth claim, for injunctive relief due to nuisance, as against the federal and state defendants; and dismissed plaintiff's fifth claim, for monetary damages due to nuisance, as against all defendants.

On October 26, 1982, at the conclusion of defendants' case, the court

dismissed the second counterclaim of defendants Rockland County Sewer District No. 1, County of Rockland and Town of Ramapo, with regard to monetary damages for nuisance, as against plaintiff. At that time, defendants Rockland County Sewer District No. 1, County of Rockland and Town of Ramapo, withdrew their third and fourth counterclaims relating to industrial pretreatment requirements, as against plaintiff.

On October 27, 1982, at the close of trial, upon consideration of argument by counsel, the court rendered a decision from the bench dismissing plaintiff's fourth claim relating to nuisance, as against all defendants, and dismissing the first counterclaim of defendants Rockland County Sewer District No. 1, County of Rockland, and the Town of

Ramapo, relating to nuisance, against plaintiff.

Upon consideration of memoranda of law submitted by counsel, the court has filed findings of fact, conclusions of law and mixed findings of fact and conclusions of law, with regard to plaintiff's remaining claims, dated January 24, 1983.

The court has filed supplemental findings of fact and conclusions of law with regard to plaintiff's fourth claim and defendants' first counterclaim, dated January 25, 1983. It is therefore hereby

ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's first claim for relief, relating to the National Environmental Policy Act is dismissed on the merits as against defendants Anne Gorsuch, individually and as Administ-

rator of the United States Environmental Protection Agency ("Gorsuch"); Richard Dewling, individually and as Regional Administrator of the United States Environmental Protection Agency ("Dewling"); Rockland County Sewer District No. 1; County of Rockland; Town of Ramapo; and Robert Flacke, as Commissioner of the New York State Department of Environmental Conservation ("Flacke").

2. Plaintiff's second claim for relief, relating to the Clean Water Act, is hereby dismissed on the merits as against defendants Gorsuch, Dewling, Rockland County Sewer District No. 1, County of Rockland, Town of Ramapo and Flacke.

3. Plaintiff's third claim for relief relating to the State Environmental Quality Review Act is hereby

dismissed on the merits as against defendants Flacke, Rockland County Sewer District No. 1, County of Rockland and Town of Ramapo.

4. Plaintiff's fourth claim for relief, relating to injunctive relief for nuisance, is hereby dismissed on the merits as against defendants Gorsuch, Dewling, Rockland County Sewer District No. 1, County of Rockland, Town of Ramapo, Town of Clarkstown and Flacke.

5. Plaintiff's fifth claim for relief, relating to monetary relief for nuisance, is hereby dismissed on the merits as against defendants Gorsuch, Dewling, Rockland County Sewer District No. 1, County of Rockland, Town of Ramapo and Town of Clarkstown.

6. Plaintiff's sixth claim for relief, related to Step III, Phase I grants for the project, is hereby

dismissed on the merits as against defendants Gorsuch, Dewling, Rockland County Sewer District No. 1, County of Rockland, the New York State Department of Environmental Conservation and Flacke.

7. The first counterclaim of defendants Rockland County Sewer District No. 1, County of Rockland and the Town of Ramapo, relating to injunctive relief for nuisance, is hereby dismissed on the merits as against plaintiff.

8. The second counterclaim of defendants Rockland County Sewer District No. 1, County of Rockland and the Town of Ramapo, relating to monetary relief for nuisance, is hereby dismissed on the merits as against plaintiff.

9. The complaint is hereby dismissed in its entirety, with costs and disbursements to defendants, and all

counterclaims are dismissed without costs.

Dated: New York, New York
February 3, 1983

Richard Owen
U.S.D.J.

JUDGMENT ENTERED: 2/4/83

Clerk

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region II
26 Federal Plaza
New York, New York 10278

August 29, 1980

To All Interested Government Agencies and Public Groups:

In accordance with the procedures for the preparation of environmental impact statements, an environmental review has been performed on the proposed agency action below:

Project Name:	Rockland County Sewer District No. 1 (RCSD No. 1) sewage treatment plant expansion, sludge handling facilities and interceptor sewers. Town of Ramapo collection sewers.
Project Numbers:	C-36-744-03 (Step 2 Grant) RCSD No. 1 C-36-1253-01 (Step 2 Grant) Town of Ramapo
Purpose of Project:	The purpose of this project is four fold: to replace failing individual septic systems in

	Ramapo with collection sewers; to provide interceptor sewers to convey sewage from the Towns of Ramapo and Clarkstown to the RCSD No. 1 STP; to expand the overloaded RCSD No. 1 STP to treat existing and future flows from the proposed service area; to provide facilities to process sludge from the RCSD No. 1 STP.
Project Originators:	RCSD No. 1 Town of Ramapo
Project Location:	Towns of Ramapo, Clarkstown and Orangetown, New York
Project Description:	Preparation of plans and specifications for construction of collection sewers, pump stations, STP expansion and sludge handling facilities as described in detail in Section IV of the attached environmental assessment.
Proposed Eligible Project Costs:	$ 3,758,380 - RCSD No. 1 $ 674,000 - Town of Ramapo

EPA Grant (75%): $ 2,858,630 - RCSD No. 1

$ 506,000 - Town of Ramapo

Our environmental review of this project indicates that no significant environmental impacts will result from the proposed action. Consequently, we have made a preliminary decision not to prepare an environmental impact statement (EIS) on the project.

This decision is based on a careful review of the engineering report, the environmental information document, and other supporting data. All of these documents, along with the environmental assessment, are on file at the EPA regional office, where they are available for public scrutiny upon request. A copy of the environmental assessment is enclosed for your review.

Both the State of New York and the EPA recognize that this project is located in an Air Quality Control Region (AQCR). This fact has been accounted for in our review.

Comments supporting or disagreeing with this decision may be submitted to the EPA for consideration. All comments must be received within thirty (30) calendar days of the date of this finding of no significant impacts (FNSI). Please address your comments to the Chief, New York and Virgin Islands Section, Environmental Impacts Branch, Room 400. After evaluating any comments

received on the project, the EPA will make a final decision. However, no administrative action will be taken on the project for at least thirty (30) calendar days after the date of this FNSI.

Sincerely yours,

Charles S. Warren
Regional Administrator

Enclosure

CLEAN WATER ACT

§1283. Plans, specifications, estimates, and payments

(a) Submission; contractual nature of approval by Administrator; combined grants

Each applicant for a grant shall submit to the Administrator for his approval, plans, specifications, and estimates for each proposed project for the construction of treatment works for which a grant is applied for under section 1281(g)(1) of this title from funds allotted to the State under section 1285 of this title and which otherwise meets the requirements of this chapter. The Administrator shall act upon such plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such plans, specifications, and estimates shall be deemed a contractual obligation of the United

States for the payment of its proportional contribution to such project.

§1284. Limitations and conditions

(a) Before approving grants for any project or any treatment works under section 1281(g)(1) of this title the Administrator shall determine -

(1) that such works are included in any applicable areawide waste treatment management plan developed under section 1288 of this title;

(2) that such works are in conformity with any applicable State plan under section 1313(e) of this title;

(3) that such works have been certified by the appropriate State water pollution control agency as entitled to

priority over such other works in the State in accordance with any applicable State plan under section 1313(e) of this title, except that any priority list developed pursuant to section 1313(e)(3)(H) of this title may be modified by such State in accordance with regulations promulgated by the Administrator to give higher priority for grants for the Federal share of the cost of preparing construction drawings and specifications for any treatment works utilizing processes and techniques meeting the guidelines promulgated under section 1314(d)(3) of this title and for grants for the combined Federal share of the cost of preparing construction drawings and specifications and the building and erection of any treatment works meeting the requirements of the next to the last sentence of section 1283(a) of this title which utilizes

processes and techniques meeting the guidelines promulgated under section 1314(d)(3) of this title;

(4) that the applicant proposing to construct such works agrees to pay the non-Federal costs of such works and has made adequate provisions satisfactory to the Administrator for assuring proper and efficient operation, including the employment of trained management and operations personnel, and the maintenance of such works in accordance with a plan of operation approved by the State water pollution control agency or, as appropriate, the interstate agency, after construction thereof;

(5) that the size and capacity of such works relate directly to the needs to be served by such works, including sufficient reserve capacity. The amount

of reserve capacity provided shall be approved by the Administrator on the basis of a comparison of the cost of constructing such reserves as a part of the works to be funded and the anticipated cost of providing expanded capacity at a date when such capacity will be required, after taking into account, in accordance with regulations promulgated by the Administrator, efforts to reduce total flow of sewage and unnecessary water consumption. The amount of reserve capacity eligible for a grant under this subchapter shall be determined by the Administrator taking into account the projected population and associated commercial and industrial establishments within the jurisdiction of the applicant to be served by such treatment works as identified in an approved facilities plan, an areawide plan under section 1288 of this title,

or an applicable municipal master plan of development. For the purpose of this paragraph, section 1288 of this title, and any such plan, projected population shall be determined on the basis of the latest information available from the United States Department of Commerce or from the States as the Administrator, by regulation, determines appropriate. Beginning October 1, 1984, no grant shall be made under this subchapter to construct that portion of any treatment works providing reserve capacity in excess of existing needs (including existing needs of residential, commercial, industrial, and other users) on the date of approval of a grant for the erection, building, acquisition, alteration, remodeling, improvement, or extension of a project for secondary treatment or more stringent treatment or new interceptors and appurtenances,

except that in no event shall reserve capacity of a facility and its related interceptors to which this subsection applies be in excess of existing needs on October 1, 1990. In any case in which an applicant proposes to provide reserve capacity greater than that eligible for Federal financial assistance under this title, the incremental costs of the additional reserve capacity shall be paid by the applicant;

(6) that no specification for bids in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability

of parts and equipment. When in the judgment of the grantee, it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement, and in doing so the grantee need not establish the existence of any source other than the brand or source so named.

(b)(1) Notwithstanding any other provision of this subchapter, the Administrator shall not approve any grant for any treatment works under section 1281(g)(1) of this title after March 1, 1973, unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the

applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share (except as otherwise provided in this paragraph) of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant; and (B) has legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of treatment works throughout the applicant's jurisdiction, as determined by the Administrator. In any case where an applicant which, as of December 27, 1977, uses a system of dedicated ad valorem taxes and the Administrator determines that the applicant has a system of charges which results in the distribution of operation and maintenance costs for treatment works within the applicant's jurisdiction, to each user class, in proportion

to the contribution to the total cost of operation and maintenance of such works by each user class (taking into account total waste water loading of such works, the constituent elements of the wastes, and other appropriate factors), and such applicant is otherwise in compliance with clause (A) of this paragraph with respect to each industrial user, then such dedicated ad valorem tax system shall be deemed to be the user charge system meeting the requirements of clause (A) of this paragraph for the residential user class and such small non-residential user classes as defined by the Administrator. In defining small non-residential users, the Administrator shall consider the volume of wastes discharged into the treatment works by such users and the constituent elements of such wastes as well as such other factors as he deems appropriate.

EPA REGULATIONS

§35.925 Limitations on award.

Before awarding initial grant assistance for any project for a treatment works through a grant or grant amendment, the Regional Administrator shall determine that all of the applicable requirements of §35.920-3 have been met. He shall also determine the following:

§35.925-1 Facilities planning.

That, if the award is for step 2, step 3, or step 2 + 3 grant assistance, the facilities planning requirements in §35.917 et seq. have been met.

§35.925-2 Water quality management plans and agencies.

That the project is consistent with any applicable water quality management (WQM) plan approved under section 208 or

section 303(e) of the Act; and that the applicant is the wastewater management agency designated in any WQM plan certified by the Governor and approved by the Regional Administrator.

§35.925-3 Priority determination.

That such works are entitled to priority in accordance with §35.915, and that the award of grant assistance for the proposed project will not jeopardize the funding of any treatment works of higher priority.

§35.925-4 State allocation.

That the award of grant assistance for a particular project will not cause the total of all grant assistance which applicants within a State received, including grant increases, to exceed the total of all allotments and reallotments available to the State under §35.910.

§35.925-5 Funding and other capabilities.

That the applicant has:

(a) Agreed to pay the non-Federal project costs, and

(b) The legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of the treatment works throughout the applicant's jurisdiction. (Also see §30.340-3 of this sub-chapter.)

§35.925-6 Permits.

That the applicant has, or has applied for, the permit or permits as required by the national pollutant discharge elimination system (NPDES) with respect to existing discharges affected by the proposed project.

§35.925-7 Design.

That the treatment works design will be (in the case of projects involving step 2) or has been (in the case of projects for step 3) based upon:

(a) Appendix A to this subpart, so that the design, size, and capacity of such works are cost-effective and relate directly to the needs they serve, including adequate reserve capacity;

(b) Subject to the limitations set forth in §35.930-4, achievement of applicable effluent limitations established under the Act, or BPWTT (see §35.917-1(d)(5)), including consideration, as appropriate, for the application of technology which will provide for the reclaiming or recycling of water or otherwise eliminate the discharge of pollutants;

(c) The sewer system evaluation and rehabilitation requirements of §35.927;

and

(d) The value engineering requirements of §35.926 (b) and (c).

§35.925-8 Environmental review.

(a) That, if the award is for step 2, step 3, or step 2+3, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) applicable to the project step have been met. The grantee or grant applicant must prepare an adequate assessment of expected environmental impacts, consistent with the requirements of Part 6 of this chapter, as part of facilities planning, in accordance with §35.917-1(d)(7). The Regional Administrator must insure that an environmental impact statement or a negative declaration is prepared in accordance with Part 6 of this chapter (particularly §§6.108, 6.200, 6.212, and

6.504) in conjunction with EPA review of a facility plan and issued before any award of step 2 or step 3 grant assistance.

(b) The Regional Administrator may not award step 2 or step 3 grant assistance if the grantee has not made, or agreed to make, pertinent changes in the project, in accordance with determinations made in a negative declaration or environmental impact statement. He may condition a grant to ensure that the grantee will comply, or seek to obtain compliance, with such environmental review determinations. The conditions may address secondary impacts to the extent deemed appropriate by the Regional Administrator

§35.925-9 Civil rights.

That if the award of grant assistance

is for a project involving step 2 or step 3, the applicable requirements of the Civil Rights Act of 1964 and Part 7 of this chapter have been met.

§35.925-10 Operation and maintenance program.

If the award of grant assistance is for a step 3 project, that the applicant has made satisfactory provision to assure proper and efficient operation and maintenance of the treatment works (including the sewer system), in accordance with §35.935-12, and that the State will have an effective operation and maintenance monitoring program to assure that treatment works assisted under this subpart comply with applicable permit and grant conditions.

§35.925-11 User charges and industrial cost recovery.

That, in the case of grant assistance for a project involving step 2 or step 3, the grantee has complied or will comply with the requirements for user charge and industrial cost recovery systems. (See §§35.928 et seq., 35.929 et seq., 35.935-13, and 35.935-15.)

(a) Grants awarded before July 1, 1979. Grantees must submit a schedule of implementation to show that their user charge and industrial cost recovery systems will be approved in accordance with the requirements of §§35.935 and 35.935-15.

(b) Grants awarded after June 30, 1979. The grantee's user charge and industrial cost recovery systems must be approved before the award of step 3 grant assistance.

(c) Letters of intent. In the case of any grant assistance for a project involving step 2 or step 3, the applicant must have received signed letters of intent from each significant industrial user stating that it will pay that portion of the grant amount allocable to the treatment of its wastes. Each such letter shall also include a statement of the industrial user's intended period of use of the treatment works. A significant industrial user is one that will contribute greater than 10 percent of the design flow or design pollutant loading of the treatment works. In addition, the applicant must agree to require all industrial users to pay that portion of the grant amount allocable to the treatment of wastes from such users.

NOTE: For a class deviation document affecting §35.925-11, see 45 FR 81567, Dec. 11, 1980.

§35.925-12 Property.

That the applicant has demonstrated to the satisfaction of the Regional Administrator that it has met or will met the property requirements of §35.935-3.

§35.925-13 Sewage collection system.

That, if the project involves sewage collection system work, such work (a) is for the replacement or major rehabilitation of an existing sewer system under §35.927-3(a) and is necessary to the total integrity and performance of the waste treatment works serving the community, or (b) is for a new sewer system in a community in

existence on October 18, 1972, which has sufficient existing or planned capacity to adequately treat such collected sewage. Replacement or major rehabilitation of an existing sewer system may be approved only if cost-effective; the result must be a sewer system design capacity equivalent to that of the existing system plus a reasonable amount for future growth. For purposes of this section, a community would include any area with substantial human habitation on October 18, 1972, as determined by an evaluation of each tract (city blocks or parcels of 5 acres or less where city blocks do not exist). No award may be made for a new sewer system in a community in existence on October 18, 1972, unless the Regional Administrator further determines that:

(a) The bulk (generally two-thirds)

of the expected flow (flow from existing plus projected future habitations) from the collection system will be for waste waters originating from the community (habitations) in existence on October 18, 1972;

(b) The collection system is cost-effective;

(c) The population density of the area to be served has been considered in determining the cost-effectiveness of the proposed project:

(d) The collection system conforms with any approved WQM plan, other environmental laws in accordance with §35.925-14, Executive Orders on Wetlands and Floodplains and Agency policy on wetlands and agricultural lands; and

(e) The system would not provide capacity for new habitations or other

establishments to be located on environmentally sensitive land such as wetlands, floodplains or prime agricultural lands. Appropriate and effective grant conditions, (e.g., restricting sewer hook-up) should be used where necessary to protect these resources from new development.

§35.925-14 Compliance with environmental laws.

That the treatment works will comply with all pertinent requirements of applicable Federal, State and local environmental laws and regulations. (See §30.101 and Subpart C of Part 30 of this chapter and the Clean Air Act.)

§35.925-15 Treatment of industrial wastes.

That the allowable project costs do not include (a) costs of interceptor or

collector lines constructed exclusively, or almost exclusively, to serve industrial sources or (b) costs allocable to the treatment for control or removal of pollutants in wastewater introduced into the treatment works by industrial sources, unless the applicant is required to remove such pollutants introduced from nonindustrial sources. The project must be included in a complete waste treatment system, a principal purpose of which project (as defined by the Regional Administrator; see §§35.903 (d) and 35.905) and system is the treatment of domestic wastes of the entire community, area, region or the district concerned. See the pretreatment regulations in Part 403 of this chapter and §35.907.

[44 FR 39340, July 5, 1979]

§35.925-16 Federal activities.

That the allowable step 2 or step 3 project costs do not include the proportional costs allocable to the treatment of wastes from major activities of the Federal Government. A "major activity" includes any Federal facility which contributes either (a) 250,000 gallons or more per day or (b) 5 percent or more of the total design flow of waste treatment works, whichever is less.

§35.925-17 Retained amounts for reconstruction and expansion.

That the allowable project costs have been reduced by an amount equal to the unexpended balance of the amounts the applicant retains for future reconstruction and expansion under §35.928-2(a)(2)(ii), together with interest earned.

§35.925-18 Limitation upon project costs incurred prior to award.

That project construction has not been initiated before the approved date of initiation of construction (as defined in §35.905), unless otherwise provided in this section.

(a) Step 1 or Step 2: No grant assistance is authorized for step 1 or step 2 project work performed before award of a step 1 or step 2 grant. However, payment is authorized, in conjunction with the first award of grant assistance, for all preaward allowable project costs in the following cases:

(1) Step 1 work begun after the date of approval by the Regional Administrator of a plan of study, if the State requests and the Regional Administrator has reserved funds for the step 1 grant. However, the step 1 grant must be

applied for and awarded within the allotment period of the reserved funds.

(2) Step 1 or step 2 work begun after October 31, 1974, but before June 30, 1975, in accordance with an approved plan of study or an approved facilities plan, as appropriate, but only if a grant is awarded before April 1, 1981.

(3) Step 1 or step 2 work begun before November 1, 1974, but only if a grant is awarded before April 1, 1980.

(b) Step 3: Except as otherwise provided in this paragraph, no grant assistance for a step 3 project may be awarded unless the award precedes initiation of the step 3 construction. Preliminary step 3 work, such as advance acquisition of major equipment items requiring long lead times, acquiring of eligible land or of an option for the purchase of eligible land, or advance

construction of minor portions of treatment works, including associated engineering costs, in emergencies or instances where delay could result in significant cost increases, may be approved by the Regional Administrator after completion of environmental review, but only if (1) the applicant submits a written and adequately substantiated request for approval and (2) written approval by the Regional Administrator is obtained before initiation of the advance acquisition or advance construction. (In the case of authorization for acquisition of eligible land, the applicant must submit a plat which shows the legal description of the property to be acquired, a preliminary layout of the distribution and drainage systems, and an explanation of the

intended method of acquiring the property.)

(c) The approval of a plan of study, a facilities plan, or advance acquisition of equipment or advance construction will not constitute a commitment for approval of grant assistance for a subsequent treatment works project, but will allow payment for the previously approved costs as allowable project costs upon subsequent award of grant assistance, if requested before grant award (see §35.945(a)). In instances where such approval is obtained, the applicant proceeds at its own risk, since payment for such costs cannot be made unless grant assistance for the project is awarded.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 39340, July 5, 1979]

§35.925-19 [Reserved]

§35.925-20 Procurement.

That the applicant has complied or will comply with the applicable provisions of §§35.935 through 35.939 with respect to procurement actions taken before the award of step 1, 2 or 3 grant assistance, such as submission of the information required under §35.937-6.

§35.925-21 Storm sewers.

That, under section 211(c) of the Act, the allowable project costs do not include costs of treatment works for control of pollutant discharges from a separate storm sewer system (as defined in §35.905).

NATIONAL ENVIRONMENTAL POLICY ACT

§4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

. . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented....

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